Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

No. 77-1511

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions and regulations involved	3
Statement	3
Summary of argument	18
Argument	27
I. The Secretary's recoupment procedures do not violate the Due Process Clause	27
A. Introduction	27
B. The private interest in the uninterrupted receipt of benefits pending final administrative action is less substantial here than in *Eldridge*	30
C. Under the Secretary's recoupment procedures, the risk of an erroneous deprivation is small	37
1. Reconsideration cases	39
2. Waiver cases	41
3. General considerations of reliability	43
D. The Secretary has a legitimate interest in retaining the procedures he has designed for the recovery of Social Security overpayments	48

Argument—Continued Page

II. The district courts lacked jurisdiction to award relief to a nationwide class including persons who have not filed any claim with the Secretary 54

A. The district courts did not have mandamus jurisdiction 54

1. Section 205(h) of the Social Security Act precludes mandamus jurisdiction in actions to recover on Social Security insurance claims 54

2. Even apart from Section 205(h), these cases do not provide an appropriate occasion for the exercise of jurisdiction under 28 U.S.C. 1361 63

B. Section 205(g) does not authorize class relief, and in particular does not authorize the class relief awarded in this case 66

1. Section 205(g) authorizes only adjudication of individual claims 66

2. Each person whose claim is to be adjudicated must satisfy the jurisdictional requirements of Section 205(g) 69

3. Section 205(g) does not authorize injunctive relief 71

4. Relief that runs nationwide is inappropriate 75

Argument—Continued Page

Conclusion 77

Appendix 1a

CITATIONS

Cases:

Aberdeen & Rockfish R.R. v. *SCRAP*, 422 U.S. 289 59
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 71
American Association of Councils of Medical Staffs v. *Califano*, 575 F.2d 1367, pet. for cert. pending, No. 78-563 63
Arnett v. *Kennedy*, 416 U.S. 134 29
Arrow Transportation Co. v. *Southern Ry.*, 372 U.S. 658 73
Association of American Medical Colleges v. *Califano*, 569 F.2d 101 63
Billiteri v. *United States Board of Parole*, 541 F.2d 938 65
Blankenship v. *Secretary of HEW*, No. 76-2342 (6th Cir. Nov. 24, 1978) 62
Board of Curators v. *Horowitz*, 435 U.S. 78 43
Brown v. *Weinberger*, 382 F. Supp. 1092, aff'd, 529 F.2d 514 65
Burnett v. *Tolson*, 474 F.2d 877 64
Cafeteria & Restaurant Workers Union Local 473 v. *McElroy*, 367 U.S. 886 ..... 29, 30
Califano v. *Sanders*, 430 U.S. 99 54
Carter v. *Seamans*, 411 F.2d 767, cert. denied, 397 U.S. 941 64
Caswell v. *Califano*, 583 F.2d 9 62
Cell Associates v. *National Institute of Health*, 579 F.2d 1155 74

Cases—Continued

	Page
Cervoni v. *Secretary of Health, Education, and Welfare*, 581 F.2d 1010	63
City of Highland Park v. *Train*, 519 F.2d 681, cert. denied, 424 U.S. 927	65
Cook v. *Arentzen*, 582 F.2d 870	65
Dayton Board of Education v. *Brinkman*, 433 U.S. 406	76
De Lao v. *Califano*, 560 F.2d 1384	61
Divine v. *Commissioner*, 500 F.2d 1041	76
Dixon v. *Love*, 431 U.S. 105	29
E. I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112	75
Frost v. *Weinberger*, 515 F.2d 57, cert. denied, 424 U.S. 958	61, 65
FTC v. *Dean Foods Co.*, 384 U.S. 597	73
Fulman v. *United States*, 434 U.S. 528	59
Fusari v. *Steinberg*, 419 U.S. 379	47
Goldberg v. *Kelly*, 397 U.S. 254	13, 20, 21, 22, 36, 38, 44
Haneke v. *Secretary of Health, Education, and Welfare*, 535 F.2d 1291	65
Humana of South Carolina, Inc. v. *Califano*, Nos. 76-1953 and 76-2125 (D.C. Cir. Sept. 18, 1978)	63
Irwin v. *Dixon*, 50 U.S. (9 How.) 10	76
Jablon v. *Califano*, 430 U.S. 924, summarily affirming 399 F. Supp. 118	67-68
Jimenez v. *Weinberger*, 523 F.2d 689, cert. denied, 427 U.S. 912	68
Johnson v. *Mathews*, 539 F.2d 1111	68
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123	29-30
Jones v. *Califano*, 575 F.2d 12	68, 69

Cases—Continued

	Page
Kendall v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524	64
Knuckles v. *Weinberger*, 511 F.2d 1221	65
Liberty Alliance of the Blind v. *Califano*, 568 F.2d 333	68
Lovallo v. *Froehlke*, 468 F.2d 340, cert. denied, 411 U.S. 918	64
Martinez v. *Richardson*, 472 F.2d 1121	61
Maryland v. *Baltimore Radio Show*, 338 U.S. 912	75
Mathews v. *De Castro*, 429 U.S. 181	35
Mathews v. *Eldridge*, 424 U.S. 319	*passim*
Mattern v. *Mathews*, 427 F. Supp. 1318, reversed and remanded, 582 F.2d 248, petition for cert. pending *sub nom. Califano* v. *Mattern*, No. 78-699	16, 41
Mattern v. *Weinberger*, 519 F.2d 150, cert. granted, vacated and remanded, 425 U.S. 987	14
Milliken v. *Bradley*, 418 U.S. 717	76
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288	73
Morrissey v. *Brewer*, 408 U.S. 471	29
Norton v. *Mathews*, 427 U.S. 524	57, 70
Philbrook v. *Glodgett*, 421 U.S. 707	68
Porter v. *Warner Holding Co.*, 328 U.S. 395	73
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148	60
Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1	72-73
Richardson v. *Belcher*, 404 U.S. 78	35
Richardson v. *Perales*, 402 U.S. 389	46
Ryan v. *Shea*, 525 F.2d 268	61

Cases—Continued

	Page
Sampson v. *Murray*, 415 U.S. 61	72
Sayers v. *Gardner*, 380 F.2d 940	42
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4	73
Shannon v. *United States Civil Service Commission*, 444 F. Supp. 354, appeal pending, No. 78-1933	51
Singleton v. *Commissioner*, cert. denied, No. 78-78 (Oct. 30, 1978)	75-76
St. Louis University v. *Blue Cross Hospital Service*, 537 F.2d 283, cert. denied, 429 U.S. 977	63
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297	26, 73
Trinity Memorial Hospital v. *Associated Hospital Service, Inc.*, 570 F.2d 660	63
United States v. *Babcock*, 250 U.S. 328	74
United States v. *United Continental Tuna Corp.*, 425 U.S. 164	60
United States ex rel. Girard Trust Co. v. *Helvering*, 301 U.S. 540	65
Vermont Yankee Nuclear Power Corp. v. *National Resources Defense Council, Inc.*, 435 U.S. 519	40
Weinberger v. *Salfi*, 422 U.S. 749	22, 24, 26, 54, 55, 57, 58, 60, 67, 70
Whitcomb v. *Chavis*, 403 U.S. 124	76
White v. *Mathews*, 559 F.2d 852, cert. denied, 435 U.S. 908	60-61
Wright v. *Califano*, Nos. 78-1174 and 78-1175 (7th Cir. Nov. 16, 1978)	62
Young v. *Weinberger*, 366 F. Supp. 81	42
Zahn v. *International Paper Co.*, 414 U.S. 291	25, 70

Constitution, statutes, rules, and regulations:

	Page
United States Constitution:	
Fifth Amendment	3
Due Process Clause	*passim*
All Writs Act, 28 U.S.C. 1651(a)	73
Privacy Act of 1974, Section 3(b), 5 U.S.C. 552a(b)	74
Railroad Retirement Act of 1974, 45 U.S.C. (Supp. V) 231i	52
Social Security Act:	
Title II, 42 U.S.C. 401 *et seq.*:	
Section 202(k)(4), 42 U.S.C. 402(k)(4)	10
Section 203(b), 42 U.S.C. 403(b)	7
Section 203(f), 42 U.S.C. 403(f)	7
Section 203(h), 42 U.S.C. 403(h)	7
Section 204, 42 U.S.C. 404	3
Section 204(a)(1), 42 U.S.C. 404(a)(1)	4
Section 204(b), 42 U.S.C. 204(b)	4
Section 205(g), 42 U.S.C. 405(g)	*passim*
Section 205(h), 42 U.S.C. 405(h)	18, 23, 24, 54, 56, 57, 58, 59, 60, 63
Section 223(d)(1)(A), 42 U.S.C. 423(d)(1)(A)	34, 42
Section 223(d)(2)(A), 42 U.S.C. 423(d)(2)(A)	34
Section 224, 42 U.S.C. 424a	35

Constitution, statutes, rules, and regulations—Continued

	Page
Title XVI, 42 U.S.C. 1381 *et seq.*	34
42 U.S.C. 1382c(a)(3)(A)	34
42 U.S.C. 1382c(a)(3)(B)	34
Medicare Act, 42 U.S.C. 1395 *et seq.*	62
42 U.S.C. 1395ff	63
42 U.S.C. 1395ii	62
42 U.S.C. 1395oo	63
2 Stat. 103-104	64
5 U.S.C. 552(a)(4)(B)	73
28 U.S.C. (1934 ed.) 41	24, 58
28 U.S.C. 1331	59, 63, 71
28 U.S.C. 1361	*passim*
28 U.S.C. 1491	63
20 C.F.R. 401.3(a)	44
20 C.F.R. 404.502(c)	31
20 C.F.R. 404.507	42
20 C.F.R. 404.510-404.511	42
20 C.F.R. 404.907-404.913	6
20 C.F.R. 404.915	6
20 C.F.R. 404.917	6

Miscellaneous:

	Page
Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967)	64
K. C. Davis, *Administrative Law Treatise*: § 23.11 (1970)	65
§§ 23.09-23.10 (1970 Supp.)	65
43 Fed. Reg. 31317 (1978) (to be codified at 20 C.F.R. 404.502(c))	5, 31

Miscellaneous—Continued

	Page
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939)	67
1 *Moore's Federal Practice* (2d ed. & Supp. 1978)	64, 65
Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 Duke L. J. 207	65
4 Pomeroy, *Equity Jurisprudence* § 1338 (5th ed. 1941)	72
S. Rep. No. 734, 76th Cong., 1st Sess. (1939)	67
S. Rep. No. 1992, 87th Cong., 2d Sess. (1962)	64
Social Security Claims Manual:	
Section 5503	6, 1a
Section 5503(c) (now 5503.2(b)	8, 1a
Section 5503.1	5, 6
Section 5503.2	4
Section 5503.2(b)	6
Section 5503.3	6
Section 5503.4	5
Section 5513.1	2a
Section 5515	31, 4a
Section 5515.2	31
Section 5515.2(a)	31
Section 5515.4	5, 31, 6a
Section 5515.4(d)(3)	33

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1A-35A) is reported at 564 F.2d 1219.

The initial opinion of the court of appeals (Pet. App. 40A-84A) is not reported. The opinion of the district court in *Elliott* (Pet. App. 89A-118A) is reported at 371 F. Supp. 960. The district court in *Buffington* did not write an opinion.

JURISDICTION

The judgments of the court of appeals (Pet. App. 38A-39A) were entered on July 1, 1977. A petition for rehearing was denied on December 15, 1977 (Pet. App. 36A-37A). On March 7, 1978, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 14, 1978. On April 5, 1978, Mr. Justice Rehnquist further extended the time to and including April 21, 1978. The petition was filed on that date and granted on October 2, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that an oral hearing be held before rather than after a Social Security beneficiary's monthly payments are reduced in order to recoup an erroneous overpayment.

2. Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of Section 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process Social Security cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

2. Section 204 of the Social Security Act, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part at Pet. App. 119A-156A.

STATEMENT

Respondents in these consolidated cases receive benefits under the Social Security old-age, survivors', and disability insurance program.[1] The Secretary of Health, Education, and Welfare determined that they had received overpayments and sought to recoup the overpayments by reducing temporarily their monthly benefits. Respondents instituted these class actions in the United States District Courts for the District of Hawaii (*Elliott*) and the Western District of Washington (*Buffington*) to compel the Secretary to afford them an opportunity for an oral hearing before, rather than after, the beginning of recoupment. The district courts held that, under the Due Process Clause of the Fifth Amendment, Social Security beneficiaries

[1] The Social Security Administration has informed us that respondent Elliott died in 1973. Accordingly, the name of another class representative should be substituted in the caption of this case.

are entitled to such pre-recovery hearings. The court of appeals affirmed with some modifications.

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare], * * * [by] decreas-[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled * * *." Section 204(b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Once the Secretary initially has determined that an overpayment has been made, the recipient is notified of the determination. He is told the amount of the alleged overpayment and how and when it occurred. He is informed of his right to contest the determination by seeking reconsideration. He is also informed of his right to request that the Secretary waive recovery, in accordance with Section 204(b).[2] The no-

[2] The Social Security Claims Manual (Pet. App. 127A-135A) instructs district offices concerning the appropriate handling of beneficiaries' inquiries that are prompted by receipt of an overpayment notice. Section 5503.2 provides that "[w]hen feasible, the response to an overpayment notice should be handled by means of personal contact" (*id.* at 128A). Personal contact permits the local SSA representative "to make inquiry on pertinent issues, give explanation as appropriate, and observe the reactions of the overpaid person for evaluation purposes" (*ibid.*). Section 5503.3 directs district office employees to explain the reasons for an overpayment and to obtain from the SSA reviewing office any information necessary to explain the overpayment or to help the beneficiary decide whether to seek reconsideration or waiver. Section 5503.4 requires district offices to inform beneficiaries that waiver of recovery may be available even if a reconsideration request is denied. In addition, the Manual provides that beneficiaries should be assisted in completing the forms required for reconsideration or waiver and that district offices should make certain the forms include the specific reasons for the beneficiary's request.

tice ordinarily proposes recovery of the overpayment through a temporary interruption of monthly benefits, to begin no earlier than 30 days after the date of the notice. Social Security Claims Manual § 5503.1 (Pet. App. 126A). At the same time, however, the notice informs the recipient that, in the great majority of cases, less onerous "partial adjustments" of monthly payments are available.[3] Finally, the notice invites

[3] Under new Claims Manual provisions (App., *infra*) that will go into effect in January 1979, the Social Security Administration will not propose a complete interruption of monthly benefits unless an overpayment was caused by a beneficiary's "intentional false statement or representation or willful concealment of, or deliberate failure to furnish, material information." The Administration ordinarily will propose a 25% reduction in monthly benefits in order to effect recovery in non-fraud cases. Smaller reductions will continue to be permitted on request in most cases under the new version of Claims Manual § 5515.4. Moreover, a recent change in the Secretary's regulations has added greater flexibility to the partial adjustment system; the Social Security Administration now is free to allow even smaller monthly reductions than were previously available. See 43 Fed. Reg. 31317 (1978) (to be codified at 20 C.F.R. 404.502(c)); see also pages 31-33 *infra*.

the beneficiary to discuss his case with the local Social Security office. See 20 C.F.R. 404.907-404.913 (Pet. App. 150A-153A); Claims Manual § 5503 (Pet. App. 125A-126A). Social Security district offices have been instructed to provide explanation and assistance to recipients who inquire about overpayment notices and the procedures for obtaining reconsideration or waiver. Claims Manual §§ 5503.2(b) and 5503.3 (Pet. App. 129A-131A).

If the recipient requests waiver of recovery or reconsideration of the determination that there has been an overpayment, recoupment is deferred pending the Secretary's administrative review (Pet. App. 126A, 130A, 134A, 139A).[4] If the Secretary decides that there was indeed an overpayment and that waiver is not warranted, the beneficiary's subsequent monthly benefit payments are reduced until the overpayment has been recouped (*id.* at 155A). The beneficiary is informed of the reasons for the Secretary's decision and of the availability of further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.915, 404.917 (Pet. App. 154A-155A). If, after such a hearing, the Secretary determines that there has been no overpayment, or that the beneficiary is entitled to waiver of recovery, the beneficiary's withheld payments are repaid, and subsequent payments are restored to the appropriate level.

2. The class representatives in *Buffington*, Fannie Buffington and Frances Biner, receive Social Secur-

[4] There is one minor exception to this rule. See Pet. 4 n.1; Social Security Claims Manual § 5503.1 (Pet. App. 127A).

ity old-age benefits. On the basis of annual reports of excess earnings filed by respondents themselves, the Secretary determined that they had received overpayments.[5]

The amount of Buffington's overpayment was $78.60. She was notified of the overpayment on October 3, 1973, and the $78.60 was withheld from her November 1973 check.[6] She then requested reconsideration by the Secretary,[7] who sustained the determination that there had been an overpayment (Pet. App. 8A). On October 22, 1974, the district court ordered the Secretary to restore to Buffington the amount re-

[5] Under 42 U.S.C. 403(h), Social Security beneficiaries are required to file such reports whenever their earnings exceed a statutory maximum (see 42 U.S.C. 403(f)). Section 203(b) of the Social Security Act, 42 U.S.C. 403(b), requires the Secretary to deduct the amount of excess earnings from monthly Social Security benefits.

[6] Under the Social Security Claims Manual provisions effective in October 1973, the Secretary did not observe a 30-day waiting period before the beginning of recoupment, where his original overpayment determination was based on an annual earnings report filed by the beneficiary. In such cases, recoupment began immediately with the first monthly payment to come due after the beneficiary had been notified of the overpayment. Even in such cases, however, the beneficiary's subsequent request for waiver or reconsideration deferred further recoupment until the initial administrative review had been completed. Since January 1, 1974, the Secretary has provided at least 30 days' notice of recoupment, even where overpayment determinations have been based on the beneficiary's own excess earnings report. See Pet. App. 4A n.3, 44A n.2.

[7] Buffington apparently did not file a formal request for waiver.

couped from her until she was given the opportunity for a hearing (A. 264). The Secretary restored the $78.60 and in November 1975 notified Buffington of her right to a pre-recoupment oral hearing. Buffington did not request such a hearing, but asked instead that the Secretary reduce her monthly benefits by $50 in order to recover the $78.60 overpayment and other uncontested overpayments that she and her husband had received. The Secretary granted this request and recoupment was completed in December 1977.

Biner's overpayment was $2,233.60, the total amount of benefits she received during 1972. After the Secretary initially concluded that she had been overpaid, Biner twice requested reconsideration of that finding; she also requested that recoupment be waived.[8] After considering Biner's submissions, the Secretary adhered to his decision that recovery of the overpayment was appropriate (Pet. App. 50A-51A).[9]

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[8] Because of an administrative error in Biner's case, these requests did not postpone recoupment pending completion of the Secretary's initial review, as they should have done under Claims Manual § 5503(c) (now § 5503.2(b) (Pet. App. 130A)).

[9] Although Biner qualified for Social Security benefits in November 1970, she did not receive benefits for 1970 or 1971, because her earnings in each of those years were approximately $6,500. In 1972, however, Biner notified the local Social Security office that she intended to stop working and therefore would not have earnings in excess of the statutory maximum that could be earned without affecting Social Security benefits. Accordingly, she received full benefits for 1972. She also continued to work and earned more than $7,000 during that year. Her employer reported these earnings to the Social Security Administration, and the Secretary then requested Biner to file an excess earnings report for 1972. The report led directly to the Secretary's overpayment determination. On the basis of these facts, the Secretary concluded that Biner was not without fault in receiving the overpayment; he therefore refused to waive recoupment (affidavit of James E. Forbus, Deputy Director, Bureau of Retirement and Survivors' Insurance, Social Security Administration; Pet. App. 8A-10A).

He agreed to recoup the overpayment by deducting $50 per month from Biner's future Social Security benefits (*id.* at 50A). After the institution of this suit, Biner received an oral hearing before an administrative law judge, who sustained the Secretary's decision (*id.* at 51A). Because Biner has received an oral hearing on her reconsideration and waiver requests, the recouped sum has not been restored to her pending the outcome of this litigation.

Buffington and Biner argued that the Secretary's procedures for recovering overpayments fail to provide due process of law because they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had jurisdiction under 28 U.S.C. 1361 and certified the suit as a nationwide class action, defining the class as all persons eligible for old-age and survivors' insurance benefits whose benefits have been or will be reduced or otherwise adjusted without notice and opportunity for a prior hearing (Pet. App. 54A; district court order of April 4, 1974).[10] The district court declared the Secretary's

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[10] The class order was later modified to exclude groups or beneficiaries whose claim to a prior hearing was the subject of litigation in other courts (Pet. App. 54A; district court order of October 29, 1974). See page 15 and note 18, *infra*.

recoupment procedures unconstitutional and enjoined the Secretary from recovering any overpayment from members of the class without affording them an opportunity for a pre-recoupment hearing (Pet. App. 42A).

3. The class representatives in *Elliott* receive either Social Security old-age insurance benefits or Social Security disability insurance benefits.[11] Overpayment determinations with respect to three of the representatives, Isabelle Ortiz, Jordan Silva, and John Vaquilar, were based on annual reports of excess earnings filed by the recipients (Pet. App. 93A-94A).[12] Respondents Evelyn Elliott, Raymond Gaines, and Nancy Yamasaki were overpaid because of administrative errors.

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[11] Under Section 202(k)(4) of the Social Security Act, 42 U.S.C. 402(k)(4), a person may not receive both old-age and disability insurance benefits for the same month.

[12] The overpayment to Ortiz was $492.80, all of which was recouped by September 1972 (May 2, 1973, affidavit of James Forbus). The total overpayments to Silva between 1968 and 1971 were approximately $3,300. Approximately $1,300 of this sum was recouped by May 1973, and further recoupment was deferred pending the disposition of this case in the district court (*ibid.*; Pet. App. 96A). The total overpayments to Vaquilar for 1967, 1968, and 1971 were approximately $2,000. Approximately $900 of this sum, the overpayment for 1971, remained outstanding in February 1973. The Social Security Administration agreed to recoup the overpayment through a temporary reduction of $40 in Vaquilar's monthly benefits (May 2, 1973, affidavit of James E. Forbus), and recoupment proceeded in this way until the district court's decision.

For seven months Elliott received both old-age and disability benefits, even though she was entitled only to one or the other (December 12, 1972, affidavit of Bernard Popick).[13] Gaines, a recipient of disability benefits, received duplicate checks for three months, apparently because he changed his address (May 2, 1973, affidavit of James E. Forbus).[14] Yamasaki, a recipient of dependent's disability benefits, received excessive payments for seven months because the Social Security Administration failed to reduce her monthly benefit level to take account of workers' compensation benefits received by her husband (*ibid.*).[15]

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[13] The overpayment to Elliott was $1,092.70. She requested that the sum be recovered through a temporary reduction of $50 in her monthly disability benefits. The Social Security Administration complied and recovered $200 by the time this suit was filed in August 1972. By agreement between the parties, the $200 was returned to Elliott pending final disposition of this litigation (December 12, 1972, affidavit of Bernard Popick).

[14] The overpayment to Gaines was $376.20. It occurred after the beginning of this lawsuit, and recoupment has been deferred pending the outcome of the case (Pet. App. 97A; May 2, 1973, affidavit of Bernard Popick).

[15] Yamasaki initially was informed that she had received an overpayment of $207.90. The Social Security Administration later learned that her husband's workers' compensation benefits had ceased four months earlier than SSA previously believed. The increased payments owed to Yamasaki, her husband, and her child as a result of this information more than cancelled the overpayment she received during the three-month period when her husband was receiving workers' compensation and her benefits were not properly adjusted. The Secretary therefore recouped the overpayment by deducting it from the amount of back Social Security benefits paid to the Yamasakis (May 2, 1973, affidavit of Bernard Popick).

Two weeks before this suit was filed, and approximately four and a half months after she received notice of the Secretary's overpayment determination, Elliott requested reconsideration and waiver. None of the other class representatives sought administrative review before the beginning of this action in August 1972. The district court found that Vaquilar, Gaines, and Yamasaki submitted the necessary request forms several months later, on the advice of counsel (Pet. App. 95A-96A & n.8, 97A & n.14).[16] After considering Vaquilar's written submissions, the Secretary concluded that the earlier overpayment determination was correct and that waiver could not be granted because Vaquilar was at fault in failing to file accurate annual reports of excess earnings (May 2, 1973, affidavit of James E. Forbus). During the pendency of this suit, the Secretary has not conducted any other administrative review proceedings concerning the overpayments received by the named respondents.

Like its *Buffington* counterpart, the complaint in *Elliott* charged that the Secretary's failure to provide an oral hearing before beginning recoupment of So-

[16] According to the Social Security Administration, Silva's claims folder indicates that he too filed a request for reconsideration and waiver after this litigation began. The Secretary reaffirmed his overpayment determination and denied the request for waiver in August 1977. There is no record that Ortiz ever filed such a request. Our petition erroneously stated that "[a]ll of the respondents sought reconsideration and waiver from the Secretary but initiated this suit before the Secretary could act on their requests" (Pet. 7).

cial Security overpayments denies beneficiaries due process of law. The district court permitted the suit to proceed as a class action on behalf of all Social Security old-age and disability insurance beneficiaries in Hawaii, who are being or will be subjected to adjustment of their benefits "without adequate prior notice of the ground for such action and without a prior hearing on disputed issues relating to such actions" (order of October 17, 1972). The court found jurisdiction under 28 U.S.C. 1361 and declared the Secretary's recoupment procedures unconstitutional (Pet. App. 112A).

The court stated that "most social security recipients depend upon their full benefits for the necessities of life," and that therefore "the adverse impact of an erroneous suspension or reduction * * * is great" (*id.* at 106A-107A; footnotes omitted). The court also found that the government has a substantial interest in the uninterrupted provision of Social Security benefits to those persons entitled to receive them (*id.* at 108A). Relying on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the court concluded that the additional administrative and fiscal burden imposed by a pre-recoupment oral hearing requirement "cannot outweigh the arguments in favor of such hearings" (Pet. App. 109A). Accordingly, the court enjoined the Secretary from "reducing, terminating, or suspending" Social Security old-age and disability insurance benefits to recipients living in Hawaii, without first affording those recipients an opportunity for an oral hearing (*id.* at 117A). The court also ordered the Sec-

retary to restore to the named respondents "any and all money withheld since June 22, 1972, without a prior hearing" (*ibid.*).

4. The court of appeals affirmed the holdings of the district courts with regard to jurisdiction and the propriety of class relief (Pet. App. 51A-63A). The court further affirmed the holdings that the Secretary's recoupment procedures are unconstitutional, but it remanded the cases to the district courts for the entry of more limited orders that would require a prior oral hearing only where the Secretary's determination might turn on the credibility of witnesses (*id.* at 63A-84A).[17] In explaining this result (*id.* at 68A-82A), the court adopted the reasoning of the Third Circuit in *Mattern* v. *Weinberger*, 519 F.2d 150 (1975), a case raising identical issues. The court specified (Pet. App. 83A) that Social Security beneficiaries have a right to be represented by counsel at pre-recoupment oral hearings and that such hearings should afford claimants an opportunity to present testimonial and documentary evidence and to cross-examine adverse witnesses. The court also required that the hearings be conducted by an independent hearing officer having no connection with the initial overpayment determination. The court directed that the hearing officer render his decision in writing and set forth his reasoning and the evidence on which he relied in an opinion to be furnished to the beneficiary.

[17] The court distinguished between two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. "Reconsideration" cases involve the correctness of the Secretary's determination that an overpayment has occurred. In the court's view (Pet. App. 77A-79A), such disputes often can be decided on the basis of documentary evidence. By contrast, in "waiver" cases, issues of credibility ordinarily are involved in determining whether a claimant was at fault in receiving an overpayment (*id.* at 80A-81A). The court determined, however, that the constitutional necessity of a prior hearing turns on the particular facts of each case and not on whether the case is one of "reconsideration" or "waiver" (*id.* at 78A-79A, 81A-82A; see also *id.* at 23A-30A).

5. After the initial decision of the court of appeals, this Court held in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. The Secretary then filed a petition for a writ of certiorari in these cases (No. 75-1234), challenging the decision of the court of appeals as inconsistent with the principles established in *Eldridge*. Even before this Court decided *Eldridge*, the Secretary had filed a petition (No. 75-649) for review of the Third Circuit's ruling in *Mattern*. The Court granted both petitions, vacated the judgments of the court of appeals, and remanded for further consideration in light of *Eldridge*. 425 U.S. 987 (1976). On remand the court of appeals adhered to the essential features of its earlier decision (Pet. App. 1A-35A).[18]

[18] The Third Circuit remanded *Mattern* to the district court, and in March 1977 that court held that the due process issue resolved in *Eldridge* is not materially distinguishable from the similar issue presented by the Secretary's recoupment procedures. Accordingly, the district court granted summary judgment for the Secretary. 427 F. Supp. 1318 (E.D. Pa.). The court of appeals reversed and adhered to the result

The court stated that Social Security old-age and survivors' insurance benefits are "partially need-based," but it acknowledged that "victims of erroneous recoupment generally can resort to welfare if in financial need" (Pet. App. 23A & nn.20, 21). The court therefore found that the strength of respondents' interest in the uninterrupted receipt of benefits pending final administrative review "lies somewhere between *Eldridge* and *Goldberg*" (*id.* at 22A-23A). The court concluded, however, that this interest, "[s]tanding alone, * * * falls short of compelling an oral pre-recoupment hearing" (*id.* at 23A).

The court distinguished *Eldridge* on two additional grounds. First, the court declared that, unlike the medical disability inquiry in *Eldridge*, waiver determinations (particularly those involving recipients' fault in inducing or retaining overpayments or recipients' detrimental reliance on incorrectly paid funds) frequently turn on issues of credibility and thereby entail a greater risk of erroneous deprivations if an evidentiary hearing is not provided before recoupment (Pet. App. 24A-30A). In the court's view, the issues relevant to a waiver decision are not as readily susceptible to documentary resolution as those relevant to a decision on the termination of disability benefits.[19]

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reached in its earlier opinion. 582 F.2d 248 (3d Cir. 1978). The Secretary has petitioned for a writ of certiorari to review this decision (No. 78-699).

[19] The court reiterated its view that, although requests to reconsider the finding of an overpayment generally would not require a prior oral hearing, reconsideration cases "may arise in which the credibility of the claimant may be determinative of the outcome," and in such cases a pre-recoupment hearing should be provided (Pet. App. 3A, 24A). To avoid the administrative difficulties created by the court's decision that the requirement of a hearing turns on the facts of each case, the Secretary has offered a pre-recoupment hearing to all class members notified of an initial overpayment determination.

Second, the court thought that the administrative burdens associated with requiring an oral hearing prior to recoupment are substantially less onerous than the corresponding burdens that would be imposed by a similar procedural requirement as a precondition to termination of disability benefits. The court predicted that Social Security beneficiaries would request pre-recoupment evidentiary hearings in only a small percentage of overpayment cases, and it stated that, in contrast to the termination situation, benefits paid during the course of additional pre-recoupment review almost always would go to persons entitled to receive them (Pet. App. 30A-33A).

The court of appeals also adhered to its previous ruling with respect to the jurisdictional issues raised by the Secretary. The court sustained the district courts' exercise of jurisdiction under 28 U.S.C. 1361 to grant injunctive and class relief that the court of appeals recognized might not be available under Section 205(g) of the Social Security Act, 42 U.S.C. 405 (g) (Pet. App. 10A & n.10). The court held that the Due Process Clause imposes on the Secretary a "*duty*" to provide certain minimum notice and hearing opportunities to Social Security recipients subject to recoupment and that mandamus lies to ensure performance of that duty (Pet. App. 11A).

In response to the Secretary's argument that Section 205(g) provides the exclusive avenue for judicial review of claims under the Act, the court stated that respondents' suits were brought to assert a constitutional due process right, not "to recover on any claim" for benefits. Accordingly, the court ruled that the actions are not covered by the jurisdictional limitations contained in Section 205(h) of the Act, 42 U.S.C. 405(h) (Pet. App. 12A-14A & nn.12, 13). Moreover, the court said, because Congress did not extend mandamus jurisdiction to all federal courts until 1962, many years after the enactment of Section 205(h), the latter statute could not have been intended to preclude the exercise of Section 1361 jurisdiction in Social Security cases (*id.* at 14A-15A & n.14).

SUMMARY OF ARGUMENT

I

The Secretary's procedures governing the recovery of Social Security overpayments provide a fair and reliable method for determining whether an overpayment has been made and, if so, whether recovery should be waived. In requiring the Secretary to offer a pre-recoupment evidentiary hearing whenever a reconsideration or waiver request involves an issue of credibility, the court of appeals departed from the principles announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The additional administrative and social costs associated with pre-recoupment oral hearings significantly outweigh any social benefits that accrue from such a requirement.

The court of appeals acknowledged that, when a beneficiary asks the Secretary to reconsider his determination that an overpayment has occurred, the matter ordinarily can be resolved by reference to documentary evidence. When a beneficiary asks the Secretary to waive recovery of an overpayment, he by definition admits that he has received payments to which he is not entitled. In either case the Constitution does not bar the Secretary from proceeding with recoupment before conducting an evidentiary hearing. The Secretary provides such a hearing after recovery has begun, and if the beneficiary's contentions are sustained, he of course receives complete reimbursement of the monies previously withheld. This procedure, combined with the existing pre-recoupment safeguards against erroneous deprivations, satisfies the Due Process Clause.

Eldridge held that the Secretary may terminate Social Security disability insurance benefits without providing a pre-termination oral hearing. The Court stated that, as a general rule, "something less than an evidentiary hearing is sufficient prior to adverse administrative action" (424 U.S. at 343). The Court identified three factors that are relevant in determining whether the Due Process Clause requires a departure from this rule in particular circumstances. They are: (1) the private interest at stake; (2) the risk of incorrect administrative decisions under existing procedures; and (3) the government interest in

the proper administration of the substantive program involved and in the avoidance of unnecessary procedural delay and expense. We consider them in turn.

(1) The private interest in the uninterrupted receipt of benefits is less substantial here than in *Eldridge*. *Eldridge* involved the termination of all disability benefits; this case involves only the temporary reduction of benefits, usually by no more than 25%, followed by a resumption of full benefits once recovery of an overpayment is complete.

In the limited number of cases in which recoupment may cause financial strain, federal and state welfare benefits ordinarily are available to relieve any hardship. By contrast, when Social Security disability insurance benefits are terminated because of a finding that disability has ceased, as in *Eldridge*, federal welfare benefits, at least, are not normally available.

Although Social Security old-age and survivors' insurance benefits are reduced when a recipient's earnings exceed a statutorily specified level, eligibility for these benefits is not dependent on need. This case is therefore unlike *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in at least two ways. Recoupment normally does not require a complete suspension of benefits and, in any event, recovery of an overpayment does not "deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264) for a post-deprivation oral hearing.

(2) The risk of an erroneous deprivation under the Secretary's existing recoupment procedures is

very small. The court of appeals recognized that this is true when beneficiaries request reconsideration of the determination that an overpayment has occurred, and it is no less true when beneficiaries request waiver of recovery. The court of appeals, however, asserted that waiver decisions frequently depend on an evaluation of the claimant's credibility and that therefore decisions based on written submissions are unreliable.

The court may well have overestimated the extent to which the Secretary's waiver decisions turn on credibility. The Secretary's regulations establish an objective standard for determining whether beneficiaries were at fault in receiving or retaining an overpayment. The beneficiary's subjective good faith is not critical.

More important, the validity of the court of appeals' conclusion is undermined by the demonstrable reliability of the Secretary's existing procedures. In the first 22 months of experience with the hearings ordered by the court of appeals, only approximately 1.6% of those denied waiver after their written submissions have been granted waiver after a pre-recoupment oral hearing. Viewed as a percentage of the total number of overpaid Social Security old-age and survivors' insurance beneficiaries, the number of persons who have obtained waiver after a pre-recoupment oral hearing is a negligible 0.03%. The Court stated in *Eldridge* that "the overall rate of error for all denials of benefits" must be considered in testing the fairness of a given set of procedures (424 U.S.

at 346 n.29). By this criterion, the Secretary's recoupment procedures are highly efficient and involve only a trivial risk of error.

(3) The Secretary has a substantial interest in averting the imposition of additional and unnecessary procedural requirements for the recovery of Social Security overpayments. The Secretary has a fiduciary responsibility to all participants in the Social Security insurance programs to protect trust fund monies. Whenever recovery of overpayments is delayed, the trust fund is diminished, and beneficiaries and potential beneficiaries who have not received overpayments suffer. Commitment of the Secretary's scarce resources to the pre-recoupment oral hearings required by the court of appeals inevitably reduces the money and manpower available to administer other aspects of the Social Security programs.

Moreover, the court of appeals' decision creates a real danger that additional procedural protections will be deemed mandatory in other federal programs. Pending litigation in the District of Columbia and the Ninth Circuit confirms this fear. In short, although the full cost of pre-recoupment hearings cannot be calculated precisely, this Court's observation in *Eldridge* (424 U.S. at 347) is equally valid here: "[T]he ultimate additional cost in terms of money and administrative burden would not be insubstantial."

II

A. *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), held that Section 205(g) of the Social Security Act,

42 U.S.C. 405(g), provides the sole source of jurisdiction for judicial review of claims arising under Title II of the Act. Accordingly, the district courts did not have jurisdiction over these suits under 28 U.S.C. 1361.

Under the principles announced in *Eldridge*, the district courts could exercise their jurisdiction under Section 205(g) to adjudicate the claims of the class representatives in these cases. Section 205(g) provides jurisdiction to review "any final decision of the Secretary made after a hearing to which [the person seeking review] was a party * * *." *Eldridge* held that, where the issue presented is "entirely collateral" to any substantive claim of entitlement to benefits, the "final decision" requirement of Section 205(g) does not necessitate exhaustion of all available opportunities for administrative review. Like the due process claim in *Eldridge*, respondents' due process contention is collateral to their claim for benefits and, accordingly, their failure to pursue an administrative appeal did not deprive the district courts of jurisdiction under Section 205(g).

Jurisdiction under 28 U.S.C. 1361, however, was not available. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), states that the Act itself provides the sole source of jurisdiction for judicial review of Social Security old-age, survivors', and disability insurance claims. Notwithstanding the court of appeals' contrary belief, this rule applies even where a claimant raises a constitutional challenge to

a decision by the Secretary. See *Weinberger* v. *Salfi*, *supra*; *Mathews* v. *Eldridge*, *supra*.

Likewise, the court of appeals erred in concluding that, because Section 1361 was enacted after Section 205(h), the latter statute could not have been intended to preclude Section 1361 jurisdiction over actions to recover on claims arising under Title II of the Social Security Act. Section 205(h)'s reference to 28 U.S.C. 41, as that provision stood when Section 205(h) was enacted in 1939, reflects a congressional purpose to bar jurisdiction under all general jurisdictional grants and to limit review of Title II claims to that provided in the Act itself. Just as Congress' failure to amend Section 205(h) to conform to the 1948 recodification of Title 28 did not affect the Court's decision on the availability of federal-question jurisdiction in *Salfi*, so the failure to amend Section 205(h) in 1962 to include a specific preclusion of Section 1361 jurisdiction does not support the availability of such jurisdiction here.

Furthermore, even apart from Section 205(h), these are inappropriate cases for the exercise of jurisdiction "in the nature of mandamus" under Section 1361. Mandamus jurisdiction is available only when there is no adequate legal remedy by which to vindicate a disputed right. Section 205(g) provides such a remedy for Social Security Act claimants and, accordingly, the district courts had no occasion to invoke Section 1361.

B. Section 205(g) of the Social Security Act does not authorize class relief. The statute permits "[a]ny

individual" to sue in federal district court to obtain judicial review of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party." The district court in such cases is empowered only to affirm, modify, or reverse the Secretary's decision. Section 205(g) thus envisions only the adjudication of individual claims, not class actions. This is hardly surprising in light of the fact that the vast majority of administrative decisions subject to review under Section 205(g) turn on particular facts.

Even if some class actions are permissible under Section 205(g), all members of the class must satisfy the jurisdictional requirements imposed by that section. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). The classes certified in these cases include Social Security recipients whose benefits "have been or will be" reduced under the Secretary's recoupment procedures without the opportunity for a prior hearing. The classes thus include many persons who have not requested reconsideration or waiver and who therefore do not satisfy Section 205(g)'s "nonwaivable" requirement that a claim be filed with the Secretary before judicial review of the Secretary's "final decision" is sought. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 328-330. Indeed, the classes include many persons as to whom the Secretary has not even made an overpayment determination. The district courts erred in exercising jurisdiction over persons who have not fulfilled the conditions prescribed by Section 205(g).

The district courts also erred in granting injunctive relief. Section 205(g) authorizes a reviewing court only "to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute says nothing about enjoining the operation of a federal statute or directing that a statute be implemented through specific procedures other than those established by the Secretary. *Weinberger* v. *Salfi, supra*, 422 U.S. at 763 n.8. An injunction is an equitable remedy and therefore is available only when there is no adequate remedy at law. Section 205(g) provides an adequate legal remedy for Social Security claims and does not contemplate equitable relief. As this Court held in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943), when Congress "select[s] the precise machinery" for the protection of an entitlement it has created, courts should not assume that other avenues of recourse also are open. "In such a case the specification of one remedy normally excludes another." *Ibid.*

Finally, even if in some circumstances injunctive class relief is available under Section 205(g), the *Buffington* court acted imprudently in certifying a nationwide class and entering a nationwide injunction. This procedure unnecessarily limits the opportunities for judicial consideration of difficult legal questions. It also may force this Court to undertake premature review of a problem without the benefit of the views of more than one lower court. The *Buffington* order thus violates equity's salutary rule that

injunctions should be used with restraint and should afford relief only to the parties properly before the court.

ARGUMENT

I

THE SECRETARY'S RECOUPMENT PROCEDURES DO NOT VIOLATE THE DUE PROCESS CLAUSE

A. Introduction

Under the procedures challenged by respondents, the Social Security beneficiary is notified by mail when the Secretary determines that he has received an overpayment.[20] He is told the amount of the overpayment and the way in which it occurred. He is also advised of his right to request reconsideration or waiver. The beneficiary thus knows the basis for the Secretary's proposed action before it is taken, and he may present objections to that action in advance. Although these objections must be submitted in writing, the beneficiary can discuss his case with Social Security officials at the district office nearest his home. These officials are responsible for assisting the beneficiary in providing all the information necessary to evaluate his case. The beneficiary may supply whatever documentation he wishes in support of his position, and printed forms are made available to facilitate the presentation of his reconsideration or waiver request.

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[20] These procedures are described more fully at pages 4-6, *supra*.

If the beneficiary requests reconsideration or waiver within 30 days, the Secretary defers recoupment until he has acted on the request.[21] Only after the Secretary has reviewed the beneficiary's case, and has adhered to his initial determination that recoupment is appropriate, does the process of recovering the overpayment begin. As soon as the beneficiary is advised of the Secretary's determination, he may request a full evidentiary hearing with respect to his claim. If the Secretary's decision is reversed after that hearing, the beneficiary receives full restitution.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court reviewed the procedures used by the Secretary in terminating Social Security disability insurance benefits to persons no longer entitled to receive them. The Secretary did not offer an oral hearing before the initial suspension of disability benefits, but the Court declared the Secretary's procedures constitutionally acceptable. The Court explained that it had not found adequate reason "to depart from the ordi-

[21] Any objection at all within the 30-day period is sufficient to postpone recoupment. Even if the beneficiary does not request reconsideration or waiver within that period, a reconsideration request made within 60 days, or a waiver request, whenever made, will result in a resumption of full benefits until the request has been acted on (Pet. App. 126A, 130A, 139A). Moreover, if the Secretary finds that there was good cause for the filing of a waiver or reconsideration request more than 30 days after the beneficiary's receipt of the initial overpayment notice, any amount already recouped by the time of the request will be restored to the beneficiary pending the Secretary's disposition of the waiver or reconsideration application (*id.* at 139A).

nary principle * * * that something less than an evidentiary hearing is sufficient prior to adverse administrative action" (424 U.S. at 343).

Here, as in *Eldridge*, procedures short of an evidentiary hearing offer the beneficiary ample protection against erroneous interim deprivations. The court of appeals' decision to the contrary appears to rest on the assumption that *Eldridge* involved a borderline situation in which the Secretary's decision not to provide a pre-suspension oral hearing narrowly survived due process scrutiny. The court of appeals apparently thought that if the present case involves any circumstance, not found in *Eldridge*, that supports the utility or desirability of pre-recoupment oral hearings, then such hearings are constitutionally compelled. *Eldridge* does not sustain such a position.

Eldridge made it clear that due process generally does not require an oral hearing prior to adverse administrative action. The Court restated this rule with approval in *Dixon* v. *Love*, 431 U.S. 105, 113 (1977). See also *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (White, J., concurring in part and dissenting in part), and cases there cited. Pre-deprivation oral hearings may be required in certain exceptional cases, because, as this Court has observed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). See also *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Joint Anti-Fascist Refugee*

Committee v. *McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring). The Court in *Cafeteria Workers* suggested that the content of due process in a given set of circumstances depends on "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action" (367 U.S. at 895). Using similar language 15 years later, *Eldridge* identified three considerations that guide the Court in determining what process is due in a particular situation (424 U.S. at 335):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Secretary's recoupment procedures accommodate the competing interests in a constitutionally permissible way.

B. The Private Interest in the Uninterrupted Receipt of Benefits Pending Final Administrative Action Is Less Substantial Here Than in *Eldridge*

1. *Eldridge* involved termination of all disability benefits; this case involves only the temporary reduction of otherwise continuing benefits in order to recover overpayments. Full benefits resume once re-

coupment is complete. Under prevailing regulations and Social Security Claims Manual provisions, beneficiaries may request that recovery be spread out to diminish the amount by which monthly payments are reduced. See 20 C.F.R. 404.502(c), as amended in 43 Fed. Reg. 31317 (1978);[22] Claims Manual §§ 5515, 5515.2, 5515.4 (Pet. App. 141A-145A). Such extensions of the recoupment period (called "partial adjustments") are routinely granted,[23] unless the overpayment was the result of fraud or unless "the beneficiary has income and resources sufficient to meet current ordinary expenses despite a loss of the full monthly benefits * * *." Claims Manual § 5515.2(a) (Pet. App. 142A).

Under the new Claims Manual provisions that will become effective in January 1979 (App., *infra*), recoupment generally will not require more than a 25% reduction in monthly benefits, unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits. Rather, it will suggest a 25% reduction in payments

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[22] The pertinent portions of Section 404.502(c), as they were before the July 1978 amendments, are reprinted at Pet. App. 146A-147A.

[23] Indeed, four of the named respondents, Buffington, Biner, Elliott, and Vaquilar, requested deferral of recoupment through partial adjustment of monthly benefits, and in all four instances the requests were granted.

and will automatically approve any reduction and recoupment schedule requested by the beneficiary, as long as the adjustment is at least $10 per month and will result in full recovery of the overpayment within 48 months (or by the date scheduled for termination of benefits, if there is such a date and it is less than 48 months from the beginning of recoupment).[24] If a plan proposed by a beneficiary does not meet these conditions, the district office will investigate the beneficiary's financial situation and will set an appropriate monthly recovery rate on the basis of the information thus obtained.

Where the beneficiary is not at fault in receiving an overpayment, but recoupment would not defeat the purpose of Title II of the Social Security Act, the district office will set a monthly recovery rate no higher than the amount by which the beneficiary's

[24] There is one exception to this rule. Before requesting a partial adjustment other than the proposed 25%, the beneficiary may apply for waiver. In connection with that application, he will be required to submit forms describing his financial circumstances. If waiver is denied, the information contained on these forms will govern the decision on a subsequent partial adjustment request. Where the details of a beneficiary's financial situation have been developed in the record, the Social Security Administration will reduce monthly insurance payments as much as possible without depriving the beneficiary of his ability to meet current expenses. Thus, depending on the personal resources and non-Social Security income revealed in the waiver application, the Administration may insist on a monthly recovery rate greater than that requested by the beneficiary and perhaps even greater than 25%.

income exceeds his expenses.[25] Where the beneficiary is at fault in receiving the overpayment, the district office will reduce monthly benefits by 25% or by the amount necessary to effect full recovery within 48 months, whichever is less.

The new Claims Manual provisions will liberalize previous practices in at least two ways: (1) recoupment through temporary suspension of a beneficiary's entire monthly payment will not even be proposed, except in cases of fraud or where overpaid funds actually remain in the beneficiary's possession; and (2) the period of time during which recoupment should be accomplished will be extended from 36 months to 48 months, thereby making it possible to grant more partial adjustments at rates below 25% of monthly benefits. As a consequence, even more than in the past the partial adjustment system ordinarily will permit monthly payments to be maintained at a level high enough to cover the recipient's current expenses.[26]

[25] If this amount is less than $10 per month, waiver will be granted and there will be no recoupment at all.

[26] Fraud cases aside, the only exceptions to this rule will be cases in which a beneficiary is at fault in receiving an overpayment and the partial adjustment necessary to allow him to meet current expenses results in a withholding so small that full recovery of the overpayment is not possible within 48 months or before the end of his entitlement to benefits. In such cases, the Secretary will withhold as much as 25% of monthly payments, even though this may reduce benefits below the level necessary to meet current expenses. Claims Manual § 5515.4(d)(3) (Pet. App. 145A).

2. Moreover, in the event that recovery of overpaid retirement or disability insurance benefits creates a situation of financial need, elderly or disabled recipients generally are eligible for Supplemental Security Income (SSI) welfare benefits under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* By contrast, because the definition of disability for Social Security and SSI purposes is the same (compare 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) with 42 U.S.C. 1382c(a)(3)(A) and (B)), a person whose disability insurance payments are terminated by virtue of a finding that his disability no longer exists, as in *Eldridge*, almost certainly would be ineligible for SSI disability benefits (424 U.S. at 342 n.27). For this reason as well, therefore, the private interest in avoiding improper recoupment of overpayments is not as great as the private interest in avoiding incorrect termination of disability benefits.

3. The court of appeals acknowledged that, "[s]tanding alone," the recipient's interest in avoiding an erroneous reduction in monthly Social Security insurance benefits "falls short of compelling an oral pre-recoupment hearing" (Pet. App. 23A). Nonetheless, the court concluded that the strength of recipients' interest in the uninterrupted receipt of benefits "lies somewhere between [the private interests at stake in] *Eldridge* and *Goldberg*" (*id.* at 22A-23A). Ignoring the fact that the respondent class in *Elliott* includes disability, as well as old-age, beneficiaries, the court of appeals attempted to dis-

tinguish *Eldridge* on the ground that the disability insurance program at issue there is not need-related, whereas the old-age and survivors' program is "partially need-based" (*id.* at 23A & n.20).[27] In support of this distinction, the court noted that old-age and survivors' "benefits are reduced by a large percentage of any income to the recipient above a very low exemption" (*id.* at 23A n.20).

This argument does not adequately distinguish disability benefits from old-age and survivors' benefits. Disability benefits, like old-age and survivors' benefits, are reduced by some forms of outside income, in particular by workers' compensation benefits. See 42 U.S.C. 424a; *Richardson* v. *Belcher*, 404 U.S. 78 (1971). The fact that the Social Security Act mandates such reductions does not mean that disability benefits are need-based. Indeed, this Court stated in *Eldridge* that "[e]ligibility for disability benefits * * * is not based upon financial need" (424 U.S. at 340). Likewise, eligibility for Social Security old-age and survivors' insurance benefits does not depend on need, although the amount of such benefits may be reduced if the recipient derives income from other sources. See *Mathews* v. *De Castro*, 429 U.S. 181, 185-186 & n.6 (1976).

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[27] At least with respect to recipients of disability benefits, the disposition of this case is squarely controlled by *Eldridge*. It would be odd if disability benefits could be terminated without a prior oral hearing, as *Eldridge* held, but could not temporarily be reduced without a prior oral hearing.

The court of appeals' effort to characterize the private interest in this case as more substantial than that in *Eldridge* is therefore unpersuasive. As the court itself admitted, "it is difficult to imagine that persons subject to a reduction in benefits under one program should have a greater interest than one subject to complete termination in a related program" (Pet. App. 23A n.20). The dominant characteristic of this case is not whether benefits are "partially need-based." It is, instead, that recoupment usually involves only a temporary reduction in benefits rather than termination.

4. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), is the only case in which this Court has held that the Due Process Clause requires an evidentiary hearing *before* a temporary interruption in government benefits. The Court recognized as much in *Eldridge* (424 U.S. at 340).

The outcome in *Goldberg* turned on the welfare context of that case. In the Court's words, "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264). Recoupment of Social Security overpayments is an entirely different matter. The harm that can be caused by an erroneous recoupment decision is minimized by the partial adjustment system, which generally prevents reduction of monthly benefits by more than 25%. Moreover, there is a significant possibility that Social Security recipients will have personal income or resources other than

their insurance payments;[28] where they do not, federal (and, in many cases, state) welfare benefits will be available to alleviate need. In other words, even if recoupment (pending an oral hearing) is erroneous, the consequence of the error is not nearly as severe as the consequence of an error in terminating welfare benefits.

C. Under the Secretary's Recoupment Procedures, the Risk of an Erroneous Deprivation Is Small

We have demonstrated above that errors in recoupment cases do not necessarily have serious consequences for beneficiaries. We argue below that the Secretary's procedures hold the risk of error to a minimum.

In weighing the risk of erroneous deprivations in the absence of additional or substitute procedures, the *Eldridge* Court focused on "the nature of the relevant inquiry" and the extent to which existing procedures "provide an effective means for the recipient to communicate his case to the decisionmaker" (424 U.S. at 343, 345). The Court observed that the medical assessments necessary for resolution of disability issues are particularly well suited to presentation in documentary form. In addition, the Court noted that the

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[28] Indeed, Social Security Administration statistics indicate that of all the overpayments to old-age and survivors' insurance beneficiaries during the first nine months of 1978, nearly 65% were attributable to the beneficiaries' own excess earnings, as reflected in annual earnings reports filed by the beneficiaries themselves.

procedures employed were designed to inform recipients of the factors likely to be critical in the entitlement decision, to ensure recipients full access to information on which the decisionmaking agency relied in reaching its initial determination, and to afford recipients an opportunity to respond to that evidence identified by the decisionmaker as most significant (424 U.S. at 345-346). The Court concluded that, under these circumstances, the lack of an evidentiary hearing prior to termination of disability benefits did not create an intolerable risk of error.

By contrast, when the Court addressed the subject of welfare terminations in *Goldberg* v. *Kelly*, *supra*, it held that exclusive reliance on written submissions violated the Due Process Clause. Where the criterion for public assistance is "need," issues of witness credibility may be of central importance. Documentary evidence alone may be inadequate to describe fully the economic situation of a welfare family. The *Goldberg* Court also stressed that persons threatened with termination of welfare benefits frequently cannot write effectively (397 U.S. at 269). Moreover, the procedure under scrutiny in *Goldberg* provided no indication of the decisionmaker's prime factual concerns in individual cases and thus did not permit recipients to shape their arguments to meet those concerns (*ibid.*). The risk of error in this situation was too great to permit the resolution of disputes on written submissions alone.

1. *Reconsideration Cases*

As the court of appeals found, when a Social Security beneficiary requests reconsideration of a determination that an overpayment has occurred, the relevant inquiry is likely to be one "well suited to resolution by documentary proof" (Pet. App. 24A). The questions asked by the decisionmaker will be simply: "Did an overpayment occur, and, if so, how much was it?" In the overwhelming majority of cases, these questions will be answered by arithmetic computations using figures derived from cancelled checks, Social Security payment records, and similar documentary evidence. The court of appeals recognized that "written submissions are adequate to effectively communicate these matters" and therefore held that the Secretary's recoupment procedures do not involve an "undue risk of erroneous deprivation" in reconsideration cases (*ibid.*).[29]

Notwithstanding this general conclusion, however, the court of appeals refused to acknowledge that pre-recoupment oral hearings are not required. Rather, the court ruled that if a request to reconsider whether an overpayment has occurred raises a credibility issue that could affect the outcome, then the beneficiary is entitled to a pre-recoupment hearing. This qualifi-

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[29] Indeed, respondents did not argue in the court of appeals, and they do not argue in this Court (Br. in Opp. 15-18), that reconsideration cases generally require a prior oral hearing (Pet. App. 24A n.22).

cation of the general rule governing reconsideration cases ignores the admonition in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344, that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."

Because the court of appeals insisted that an opportunity for a pre-recoupment hearing be provided in some reconsideration cases, the Secretary has offered such a hearing to all Social Security beneficiaries who have requested reconsideration of the determination that an overpayment has occurred (see note 19, *supra*). The Secretary regards this alternative as preferable to examining each request individually to see whether a credibility issue might be involved. The latter process would entail considerable administrative expense, and an incorrect decision on whether to offer a pre-recoupment hearing could lead to reversal on judicial review. This case thus illustrates the undesirable consequences of a rule under which the agency cannot know, until the case is over and a court has spoken, what procedures it should have used. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546-548 (1978). In light of the court of appeals' recognition that reconsideration issues ordinarily lend themselves to documentary resolution, the Due Process Clause does not require a pre-recoupment evidentiary hearing in those comparatively rare cases in which a reconsideration request raises a credibility issue.[30]

2. *Waiver Cases*

Turning to cases in which a beneficiary seeks waiver of recoupment of an admitted overpayment, the court of appeals identified three issues that the Secretary must address. A request for waiver requires the Secretary to determine: (1) whether the beneficiary was at fault in receiving or retaining the overpayment; (2) the extent of the beneficiary's financial dependence on his monthly Social Security benefits; and (3) whether and to what extent the beneficiary relied to his detriment on the overpayment (Pet. App. 25A). In the court of appeals' view, these issues, particularly the first and the third, inevitably turn on the credibility of the claimant and other witnesses and therefore cannot reliably be resolved through written submissions (*id.* at 26A-30A). By contrast, according to the court, the medical disability inquiry reviewed in *Eldridge* involves a relatively objective assessment of a beneficiary's physical and mental condition on the basis of clinical and laboratory evidence.

The court of appeals has drawn too sharp a distinction between the critical issues faced by the Secre-

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[30] The Third Circuit reached this conclusion in *Mattern* v. *Mathews*, 582 F.2d 248, 256-257 (1978), petition for cert. pending *sub nom. Califano* v. *Mattern*, No. 78-699. (For the reasons discussed elsewhere in the brief, we disagree with the remaining portions of the holding in *Mattern*.)

tary in deciding whether to waive recovery of Social Security overpayments and the issues relevant to a decision on whether disability insurance benefits should be terminated. The court has overestimated the role of the claimant's credibility in the former decisions and underestimated its role in the latter.

The central inquiry in the termination procedures approved in *Eldridge* is whether a disability beneficiary is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." 42 U.S.C. 423(d)(1)(A); 424 U.S. at 336. In some cases the result of this inquiry may well depend on subjective factors, such as the degree of pain experienced by the claimant or the debilitating effect of mental disorders, periodic "blackouts," or alcoholism. See, *e.g.*, *Sayers* v. *Gardner*, 380 F.2d 940 (6th Cir. 1967); *Young* v. *Weinberger*, 366 F. Supp. 81 (D. Md. 1973). The Court recognized in *Eldridge* that "credibility and veracity may be a factor in the ultimate disability assessment in some cases" (424 U.S. at 344). Nonetheless, the mere fact that the claimant's credibility may be at issue did not lead the Court to require pre-termination oral hearings.

On the other side of the coin, the claimant's credibility may not be as important a factor in waiver determinations as the court of appeals thought. The Secretary's regulations (20 C.F.R. 404.507, 404.510-404.511) provide that a beneficiary is "at fault" in receiving or retaining an overpayment if he knew or should have known that the payment was incorrect

or was based on incomplete or inaccurate information. The regulations thus incorporate an objective standard of fault that depends on the exercise of reasonable care rather than on individual good faith.

The court of appeals' statement that "[t]he decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he 'should have known'" (Pet. App. 28A n.23) is unconvincing. Most beneficiaries will be able to describe in writing any individual limitations that the Secretary should consider in determining fault under the "reasonable person" standard. Indeed, this Court decided in *Eldridge* that such personal characteristics as age, education, and physical and mental condition are amenable to written presentation (424 U.S. at 343-347 & n.28). The court of appeals therefore overstated the importance of credibility evaluations and the need for a personal appearance in the waiver context.

3. *General Considerations of Reliability*

Even if the issues relevant to waiver are more diffuse than those relevant to the cessation of medical disability, this does not mean that decisions based on written submissions are likely to be unreliable.[31] The Secretary's recoupment procedures are calculated to apprise beneficiaries of the facts deemed pertinent by

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[31] That considerations may be diffuse does not necessarily mean that the Due Process Clause calls for additional safeguards. See *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978).

the decisionmaker and to enable beneficiaries to respond meaningfully to unfavorable initial findings. The Secretary informs beneficiaries of the reasons for overpayment determinations and thereby permits Social Security recipients "'to mold [their] argument[s] to the issues the decision maker appears to regard as important.'"[32] *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 345, quoting *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269. Specific forms are provided for reconsideration and waiver requests, and beneficiaries are guaranteed access to the files containing information on the overpayments they allegedly received. See 20 C.F.R. 401.3(a). Beneficiaries may submit whatever documentation they wish in support of their claims, and they may consult with the appropriate Social Security district office concerning the reasons for the Secretary's overpayment or waiver determinations. In short, the Secretary's recoupment procedures contain ample safeguards against mistake.

This conclusion is supported by experience. The district court's order in *Buffington* was not stayed pending appeal. Accordingly, after an initial period of preparation during which no overpayments were

[32] Of course, where the beneficiary requests waiver, *he* frames the relevant issues in the first instance. The beneficiary himself decides why he should not be found "at fault" and why, in his particular circumstances, recovery of an overpayment would defeat the purpose of Title II of the Social Security Act. Accordingly, there is much less reason to permit a pre-recoupment response to a denial of waiver than there is to allow the beneficiary to challenge the correctness of the Secretary's overpayment determination before recovery begins.

recovered, the Secretary began to offer pre-recoupment evidentiary hearings. The first such hearings were held in January 1977. Approximately 1.25 million Social Security old-age and survivors' insurance beneficiaries are overpaid annually.[33] In calendar year 1977, 42,880 persons (3.4% of this group) requested waiver of recoupment.[34] After determinations

[33] This is the class covered by the *Buffington* injunction. During the first nine months of 1978, the average overpayment to persons overpaid under the old-age and survivors' insurance program was $532.11. Recovery of this average overpayment over the 48-month period permitted by the new Claims Manual provisions would result in the withholding of approximately $11 monthly from Social Security benefit checks.

The class in *Elliott* also includes disability insurance beneficiaries living in Hawaii. Nationwide, approximately 200,000 disability beneficiaries are overpaid annually. During the first nine months of 1978, the average overpayment to persons in this group was $689.65. Recovery of this average overpayment over the 48-month period permitted by the new Claims Manual provisions would result in the withholding of approximately $14.50 monthly from disability insurance payments.

[34] The corresponding figures for the first nine months of 1978 indicate that the rate of waiver requests is remaining nearly constant. During that period, the Secretary determined that 964,646 old-age and survivors' insurance beneficiaries received overpayments, and 34,233 (3.5%) requested waiver. (The Social Security Administration reports that the number of beneficiaries who seek reconsideration and not waiver is negligible.)

The rate of waiver requests among overpaid disability beneficiaries is substantially higher. Of 154,271 persons who the Secretary determined had received disability overpayments during the first nine months of 1978, 47,762 (31.0%) requested waiver.

based on the beneficiaries' written submissions, approximately 19,400 requests (45.3%) were granted.[35]

Of the approximately 23,480 recipients whose waiver requests were denied, 1,282 (5.46%) sought a pre-recoupment oral hearing. Results of this group of hearings have not yet been tabulated. However, of the first 2,084 personal conferences held under the *Buffington* injunction between January 1977 and October 1978,[36] 623 (30%) resulted in reversal of previous waiver denials. At this rate, the personal conferences requested in 1977 can be expected to produce approximately 385 grants of waiver. Thus, of the 1.25 million persons who the Secretary initially concludes have been overpaid each year, approximately 385—or 1.6% of those who were denied waiver following written proceedings of the sort the Secretary supplied before the *Buffington* injunction, and 0.03%

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[35] Figures for the first nine months of 1978 show a slightly higher percentage of waiver requests granted. Of the 34,233 requests filed by old-age and survivors' insurance beneficiaries, 16,600 (49.7%) were granted. Of the 47,762 requests filed by disability insurance beneficiaries, 24,662 (51.6%) were granted.

The high rate of waiver grants belies the court of appeals' assertion that "most of the factors involved in a waiver determination are not capable of resolution by written submissions" (Pet. App. 30A). This Court has said that a similar reversal rate in a different context under the Social Security disability insurance program "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

[36] Many of these conferences were requested in the period before 1977.

of those whose payments are recouped—would obtain a different result under a pre-recoupment oral hearing procedure.

Perhaps the most noteworthy statistics are the low percentage of persons who seek waiver of recoupment, and the low percentage of those denied waiver who seek an oral hearing. The error rate certainly compares favorably with that discussed by this Court in *Eldridge* (424 U.S. at 346-347 & n.29). Nonetheless, the court of appeals concluded that the Secretary's recoupment procedures are error-prone. It relied for this conclusion on the high success rate of those who challenge overpayment determinations and waiver decisions (Pet. App. 32A, 74A; see also Pet. App. 99A-100A). *Eldridge*, however, teaches that "in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits." 424 U.S. at 346 n.29; see also *Fusari* v. *Steinberg*, 419 U.S. 379, 383 n.6 (1975). Viewed from this perspective, the Secretary's procedures are highly reliable and involve no more than a trival (0.03%) risk that deserving beneficiaries will be deprived of Social Security insurance payments during the period between the start of recoupment and the availability of an oral hearing.

D. The Secretary Has a Legitimate Interest in Retaining the Procedures He Has Designed for the Recovery of Social Security Overpayments

The last of the considerations listed in *Eldridge* is "the public interest," particularly "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to" a deprivation of benefits (424 U.S. at 347). Admitting the difficulty of predicting the magnitude of such increased costs, the Court stated that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial" (*ibid.*).

The Court's judgment is confirmed by the facts of this case. Because of the Secretary's efforts to minimize the financial imposition on beneficiaries and the risk of error, the recovery of Social Security overpayments already is a protracted process. When the new Claims Manual provisions become effective in January 1979, recoupment routinely will extend over a four-year period. Moreover, recoupment does not even begin until the beneficiary has received 30 days' notice and the Secretary has acted on any request for reconsideration or waiver. These procedural safeguards inject significant delay into the recoupment system and thereby impose substantial costs on the Social Security trust fund. The Secretary estimates that the delay generated by the existing notice, reconsideration, waiver, and partial adjustment pro-

cedures annually deprives the trust fund of several million dollars in unrecovered overpayments. The 30-day notice period alone results in an annual loss of at least $850,000 in interest that could be earned if overpayments were recovered more expeditiously.[37] This is not to say, of course, that the notice period should be eliminated or that any of the existing procedural protections are undesirable. It is only to indicate that substantial costs are associated with such devices, and new procedural requirements should not be imposed without careful consideration of the additional costs involved. The court of appeals simplifies too much when it concludes that pre-recoupment oral hearings will "merely require the Government to exercise a little forebearance before taking money

[37] The $850,000 figure is derived from statistics available for the first nine months of 1978. Those statistics indicate that approximately $685 million will be overpaid to Social Security old-age and survivors' insurance beneficiaries in 1978. If all of these overpayments were fully recovered over a 48-month period, the average monthly recovery would be $14.3 million. At a 6% annual rate of interest, delaying these monthly recoveries by 30 days would cost approximately $850,000 per year.

For greater accuracy, these figures would need to be adjusted to take account of the facts that overpayments are recovered at different rates and that some are not fully recovered. But there is little chance that the $850,000 estimate of the annual interest cost of the 30-day notice period errs by being too high. This is so because the figures on which the estimate is based do not reflect in any way the delay connected with recovery of overpayments to beneficiaries of Social Security *disability* insurance. If disability overpayments were included in the preceding calculations, the interest cost of the 30-day notice period could only increase.

from the claimants via recoupment" (Pet. App. 33A). This remark assumes that no one loses when the Secretary defers recovery of monies owing to the trust fund. It ignores the fact that the Secretary is obliged to protect the interests of all Social Security recipients, not just those of overpaid beneficiaries.

Pre-recoupment oral hearings inevitably entail significant delay. At present, the average period of time between a beneficiary's request for a personal conference and the administrative decision after such a conference is approximately 160 days. The evidentiary hearings ordered by the court of appeals thus already have imposed new costs on the administration of the Social Security program. The Secretary estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000. This does not include losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period (during which the recipient may have died or become ineligible for some other reason). It also does not include the loss of interest on overpaid funds whose recovery is delayed. The expense of establishing and maintaining a personal conference system with trained staff is another cost that must be added. And, perhaps most importantly, the Secretary's estimate does not include the costs of delay introduced elsewhere in the administrative process, as scarce resources are devoted to hearings in recoupment cases. The delay hurts both applicants for new benefits and existing beneficiaries when the unavailability of staff prevents the processing of new claims and post-entitlement actions.

Moreover, there is a significant possibility that the number of oral hearings will increase as Social Security recipients increase in number and become more familiar with the available procedures. Of even greater significance are the possible implications of the court of appeals' decision in non-recoupment cases and cases not involving the Social Security program. To the extent this case represents the court of appeals' judgment that beneficiaries of government programs generally are entitled to pre-action hearings, it can be expected to spawn a series of requests for such hearings in a variety of other programs. For example, Social Security recipients facing termination or suspension of benefits may well claim entitlement to an evidentiary hearing before adverse administrative action, on the ground that *Eldridge* is limited to medical disability cases.

The prospect of increased demand for pre-deprivation hearings is not purely speculative. In *Shannon* v. *United States Civil Service Commission*, 444 F. Supp. 354 (N.D. Cal. 1977), appeal pending, No. 78-1933 (9th Cir.), the district court held that retired federal employees are entitled to an evidentiary hearing before the Civil Service Commission may begin recovery of annuity overpayments or may deduct uncollected federal health and life insurance premiums from annuity checks.[38] In addition, in

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[38] The Ninth Circuit has stayed proceedings on the Commission's appeal pending this Court's disposition of the present case.

Pope v. *Railroad Retirement Board* and *Thrash* v. *Railroad Retirement Board*, Civ. Nos. 77-2166 and 78-0313 (D. D.C.), plaintiffs have challenged the Board's procedures for recovery of erroneous overpayments under the Railroad Retirement Act of 1974, 45 U.S.C. (Supp. V) 231i. A major issue in the litigation is whether the Board must provide pre-recoupment oral hearings in some or all cases. These lawsuits, together with the district court's ruling in *Shannon*, demonstrate that the court of appeals' decision in the present case is likely to have repercussions beyond the Social Security insurance program.

Apart from this potential effect, however, and apart from the additional fiscal burden imposed by a pre-recoupment hearing requirement, this case raises the larger question whether incorporation of judicial-type procedures in the administrative process necessarily ensures greater fairness, as respondents seem to assume. The Court in *Eldridge* addressed this question, and the Court's concluding remarks are especially relevant here (424 U.S. at 348-349):

> [M]ore is implicated in cases of this type than *ad hoc* weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation

> of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. * * * In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. * * * This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.

In light of these considerations, and the arguments presented above, the court of appeals erred in holding that the Due Process Clause requires pre-recoupment oral hearings.

II

THE DISTRICT COURTS LACKED JURISDICTION TO AWARD RELIEF TO A NATIONWIDE CLASS INCLUDING PERSONS WHO HAVE NOT FILED ANY CLAIM WITH THE SECRETARY

A. The District Courts Did Not Have Mandamus Jurisdiction

1. *Section 205(h) of the Social Security Act Precludes Mandamus Jurisdiction in Actions to Recover on Social Security Insurance Claims*

a. Weinberger v. *Salfi*, 422 U.S. 749, 757 (1975), held that Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides the sole jurisdictional basis for judicial review of claims arising under Title II of the Act. Section 205(h), 42 U.S.C. 405(h), excludes other sources of jurisdiction.[39] The Court reaffirmed this conclusion in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 327. See also *Califano* v. *Sanders*, 430 U.S. 99, 110-111 (1977) (Stewart, J., concurring). It follows that the district courts erred in relying on 28 U.S.C. 1361 as the source of jurisdiction in these actions.

We do not argue that the district courts lacked authority to adjudicate the claims of the individual class representatives. Section 205(g) itself confers

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[39] In pertinent part, Section 205(h) provides:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

such jurisdiction, as the court of appeals recognized (Pet. App. 10A n.10). Section 205(g) authorizes judicial review of "any final decision of the Secretary made after a hearing to which [the person seeking review] was a party * * *." See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764. The Court in *Eldridge* interpreted the "final decision" language to require at least that "a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. All the class representatives in the present cases, with the possible exception of Ortiz, have requested reconsideration or waiver and thus have fulfilled the requirement that a claim be presented to the Secretary.

Eldridge further held that exhaustion of the administrative remedies prescribed by the Secretary may be omitted in appropriate cases and is not inevitably a prerequisite to district court jurisdiction under Section 205(g). 424 U.S. at 328, 330-332. None of the class representatives in these cases exhausted the opportunities for administrative review of the Secretary's overpayment and waiver determinations. As in *Eldridge*, however, the constitutional challenge to the Secretary's recoupment procedures is "entirely collateral" to any substantive claim of entitlement to benefits. Moreover, because respondents' due process argument depends in part on an assertion that erroneous recoupment "would damage [them] in a way not recompensable through retroactive payments," the Secretary's post-deprivation review procedures, whatever their outcome, would not answer fully the constitutional question here pre-

sented. *Id.* at 331-332. Accordingly, under *Eldridge*, the failure of the class representatives to exhaust their administrative remedies does not defeat the district courts' jurisdiction under Section 205(g).

b. As the court of appeals candidly acknowledged (Pet. App. 10A n.10), it sustained the district courts' exercise of mandamus jurisdiction under 28 U.S.C. 1361 largely because it wished to avoid any difficulties regarding the propriety of class relief under Section 205(g). But *Salfi* held that Section 205(g) provides the exclusive avenue for judicial review of claims under the Social Security old-age, survivors', and disability insurance program. Courts are not free to rely on other sources of jurisdiction merely because Section 205(g) does not authorize all possible forms of relief for all possible class members.

The court of appeals attempted to distinguish *Salfi* on the ground that the question involved in that case concerned the merits of a claim for benefits, whereas respondents' suits "assert a constitutional right to due process" (Pet. App. 12A). The court also stated that, in passing Section 205(h), Congress could not have intended to preclude district courts' jurisdiction under 28 U.S.C. 1361, because Section 1361 was not added to the Judicial Code until more than 20 years after the enactment of Section 205(h). Neither argument is persuasive.

The answer to the first point begins with *Salfi* itself. The case involved a constitutional challenge to the Social Security Act's "duration-of-relationship" requirement for recipients of survivors' insurance benefits. The Court held that, notwithstanding the

constitutional nature of appellees' complaint, Section 205(g) provided the only source of jurisdiction. 422 U.S. at 756-762. Before judicial review could be had, a claim for benefits had to be presented to the Secretary, even though he was powerless to alter the challenged statutory provisions. Although appellees' complaint was prompted by the Secretary's "nondiscretionary application of allegedly unconstitutional statutory restrictions" (*id.* at 762), the Court held that the lawsuit was an action to recover on a claim arising under Title II of the Social Security Act and that jurisdiction therefore was controlled by Section 205(h). *Mathews* v. *Eldridge*, *supra*, involved precisely the same kind of due process claim that respondents raise here, and the Court nevertheless stated that "[t]he only avenue for judicial review is 42 U.S.C. § 405(g)" (424 U.S. at 327).[40] Once again, the Court treated the suit as an action to recover on a claim arising under Title II, even though plaintiff asserted a constitutional right.

There is even more reason here than there was in *Salfi* to require the submission of a claim to the Secretary as a precondition to judicial review. The Secretary may well reconsider his decision or grant

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[40] Later in its opinion, the Court observed that because it had found jurisdiction available under Section 205(g), it did not need to "consider Eldridge's contention that notwithstanding § 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. § 1361" (424 U.S. at 332 n.12). See Pet. App. 13A n.12. The question of mandamus jurisdiction over Social Security claims was similarly reserved in *Norton* v. *Mathews*, 427 U.S. 524, 529-530 (1976).

waiver of recovery. In that event recoupment would never start, and the claimant would have no grievance requiring judicial resolution."[41] Courts need not adjudicate the constitutional arguments of persons who may never be aggrieved if they follow the Secretary's procedures.

Salfi and *Eldridge* thus demonstrate that Section 205(h) covers both substantive challenges to the constitutionality of particular Social Security Act provisions and due process attacks on the methods used by the Secretary to reduce or terminate benefits. In neither case may the effect of Section 205(h) be avoided simply by an assertion that the action arises under the Constitution.

The fact that Section 205(h) was passed before 28 U.S.C. 1361 also offers no support for the exercise of jurisdiction under Section 1361. As this Court observed in *Salfi* (422 U.S. at 756 n.3), the literal wording of 42 U.S.C. 405(h) "bars actions under 28 U.S.C. § 41. At the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of the title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes." By precluding suits under 28 U.S.C. (1934 ed.) 41, there-

[41] In addition, where the constitutional grievance concerns not the provisions of a statute but the adequacy of procedures established by the Secretary, there is at least the possibility that the Secretary will change his procedures as the result of the administrative claim and thereby render judicial intervention unnecessary.

fore, Congress intended to make the Social Security Act itself the sole source of jurisdiction over actions to recover on claims arising under Title II.

Congress did not consciously abrogate this policy when, many years later, it extended to all federal district courts the mandamus jurisdiction previously exercised only by the United States District Court for the District of Columbia. The legislative history of 28 U.S.C. 1361 does not mention the Social Security Act, and there is no indication whatever that Congress envisioned Section 1361 as a means by which the jurisdictional limitations included in the Act could be circumvented. Although Congress could have amended Section 205(h) to reflect the recodification of Title 28 in 1948, its failure to do so did not prevent this Court from holding in *Salfi* that Section 205(h) precludes federal-question jurisdiction under 28 U.S.C. 1331. The Court has held in connection with similar problems caused by the 1948 recodification that it will not infer that Congress meant to change the meaning of the existing statutes. *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 309 n.12 (1975). See also *Fulman* v. *United States*, 434 U.S. 528, 538-539 (1978) (collecting cases). Under the principles of *SCRAP*, the reference to "section 41 of title 28" should be interpreted to include all general sources of federal jurisdiction, because that was the meaning the reference plainly had until the 1948 recodification.

Although Congress could have amended Section 205(h) to include a specific preclusion of Section

1361 jurisdiction after that Section's enactment in 1962, Congress' failure to pass such an amendment should not be viewed as a repeal of Section 205(h) by implication and a silent abandonment of the earlier legislative decision to limit jurisdiction over Social Security Act claims to that provided in the Act itself. The Court frequently has said that repeals by implication are not favored, and that a specific jurisdictional statute prevails over subsequent more general legislation. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). These principles demonstrate that Section 205(g) continues to be the sole source of jurisdiction to review Social Security old-age, survivors', and disability insurance cases.

c. On at least one prior occasion, the Secretary has argued that Section 205(h) precludes jurisdiction under 28 U.S.C. 1361 even where a plaintiff has raised a colorable constitutional claim and jurisdiction under Section 205(g) is unavailable. See *Califano* v. *White*, No. 77-866, cert. denied, 435 U.S. 908 (1978), Pet. 15-17. Whatever may be the merits of this position, there is no reason to read Section 205(h) narrowly in cases like the present, where judicial review of the class representatives' due process claim is authorized by Section 205(g). No "serious constitutional question" (*Salfi*, *supra*, 422 U.S. at 762) is created by a statute giving any person a means to obtain judicial review if only he will follow the requirement to file an administrative claim. The

statute does not preclude judicial review; it simply establishes conditions for obtaining review.

The cases on which the court of appeals and respondents relied in support of jurisdiction under 28 U.S.C. 1361 are either irrelevant or unpersuasive. Two of the cases cited by the court were decided before *Salfi* and did not consider the effect of Section 205(h). See *Frost* v. *Weinberger*, 515 F.2d 57, 61-62 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Martinez* v. *Richardson*, 472 F.2d 1121, 1125-1126 (10th Cir. 1973). A third case cited by the court of appeals, *Ryan* v. *Shea*, 525 F.2d 268, 271-272 (10th Cir. 1975), distinguished *Salfi* on the ground that it did not involve a procedural due process claim. As we have argued above (see pages 56-58, *supra*) this distinction is invalid. *Mathews* v. *Eldridge*, *supra*, fully answered the Tenth Circuit's concern that Section 205(g)'s exhaustion requirement would cause irreparable injury before a due process claim to a pre-deprivation hearing could receive judicial attention.

Respondents cite (Br. in Opp. 22) two additional cases that allegedly support the district court's exercise of jurisdiction under 28 U.S.C. 1361. See *White* v. *Mathews*, 559 F.2d 852, 855-856 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *De Lao* v. *Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977). In *De Lao* the court of appeals' reference to Section 1361 is dictum, because the Secretary conceded and the court found that the district courts had jurisdiction under Section 205(g). Moreover, *De Lao* was

decided after and explicitly relied on the court of appeals' ruling in this case; it cannot provide support for that ruling. Finally, *White* raised a jurisdictional issue more difficult than that presented here.[42] Plaintiff alleged that the Secretary's delay in rendering his final decision violated the Due Process Clause. The court concluded that jurisdiction under Section 205(g) was unavailable because plaintiff could not await the Secretary's decision before challenging the delay in its issuance. In the absence of jurisdiction under 28 U.S.C. 1361, therefore, plaintiff's constitutional claim could not have been heard.[43] The court of appeals' recognition of mandamus jurisdiction in *White* does not compel a similar result here, where the class representatives' due process claim can be resolved under Section 205(g).[44]

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[42] We first mentioned *White* at page 60, *supra*.

[43] The jurisdictional result of *White* has been followed by three other circuits. See *Blankenship* v. *Secretary of HEW*, No. 76-2342 (6th Cir. Nov. 24, 1978), slip op. 2-4; *Wright* v. *Califano*, Nos. 78-1174 and 78-1175 (7th Cir. Nov. 16, 1978), slip op. 5-8; *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978) (all finding jurisdiction under Section 205(g)). The courts have disagreed, however, on the merits of the argument that delay in holding a hearing violates either the Constitution or the Social Security Act.

[44] In addition to the cases cited by respondents and the court of appeals, there are several decisions under the Medicare Act, 42 U.S.C. 1395 *et seq.*, that raise similar problems. Section 205(h) of the Social Security Act is incorporated into the Medicare Act by 42 U.S.C. 1395ii. Section 205(g), however, is not incorporated. Instead of adopting a general judicial review provision, Congress chose to limit review of administrative actions under the Medicare Act to certain

2. *Even Apart from Section 205(h), These Cases Do Not Provide an Appropriate Occasion for the Exercise of Jurisdiction under 28 U.S.C. 1361*

The foregoing discussion concerns only the question whether Section 205(h) makes 28 U.S.C. 1361 unavailable as a source of jurisdiction in Social Security cases. Whether or not our argument on that point is correct, there is a serious question whether

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specific categories of disputes. See 42 U.S.C. 1395ff, 1395*oo*. Since *Salfi* a number of cases have approved district court review of procedural due process claims under the Medicare Act, notwithstanding the Act's incorporation of Section 205(h). The cases have cited different jurisdictional bases. See *Cervoni* v. *Secretary of Health, Education, and Welfare*, 581 F.2d 1010, 1017 (1st Cir. 1978) (jurisdiction based on 28 U.S.C. 1331) (dictum); *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 283, 291-292 (8th Cir.), cert. denied, 429 U.S. 977 (1976) (28 U.S.C. 1331); *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101, 111-113 (D.C. Cir. 1977) (28 U.S.C. 1361, but only in limited circumstances, not for all constitutional claims) (dictum). See also *Humana of South Carolina, Inc.* v. *Califano*, Nos. 76-1953 and 76-2125 (D.C. Cir. Sept. 18, 1978) (apparently asserting jurisdiction under 28 U.S.C. 1331 to review Administrative Procedure Act claim arising in the Medicare context). At least one circuit has held that Section 205(h), as incorporated in the Medicare Act, bars district court review of certain procedural due process claims. See *Trinity Memorial Hospital* v. *Associated Hospital Service, Inc.*, 570 F.2d 660, 667 (7th Cir. 1977). The Seventh Circuit indicated, however, that the constitutional claim could be heard in the Court of Claims under 28 U.S.C. 1491. And see *American Association of Councils of Medical Staffs* v. *Califano*, 575 F.2d 1367 (5th Cir. 1978), pet. for cert. pending, No. 78-563. These cases illustrate the courts' uneasiness with any statutory scheme that threatens to preclude judicial review of constitutional challenges. That problem is simply not presented here, because of the jurisdictional grant in Section 205(g).

this is an appropriate case for the exercise of mandamus jurisdiction. Since the enactment of Section 1361 in 1962, this Court has not had occasion to consider the precise bounds of district court jurisdiction under that provision. The legislative history of Section 1361 indicates that the law was intended not to expand the scope of the mandamus jurisdiction previously exercised by the United States District Court for the District of Columbia,[45] but only to extend that jurisdiction to the other federal district courts. See S. Rep. No. 1992, 87th Cong., 2d Sess. 2-3 (1962).[46] This Court's decisions on review of man-

[45] This jurisdiction was derived not from Title 28, the Judicial Code, but from the pre-cession laws of Maryland. See 2 Stat. 103-104 (1801); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 310-312 (1967).

[46] Professor Moore has taken the position that the requirements for mandamus jurisdiction under Section 1361 are the same as they were at common law. According to this view, "mandamus may be granted only when (1) the plaintiff has a plain right to have an act performed, (2) the defendant has a plain duty to perform it, and (3) there is no other adequate remedy available to the plaintiff." 1 *Moore's Federal Practice* ¶ 0.62[17], at 700.51 (2d ed. 1978). Similar statements concerning the prerequisites for mandamus jurisdiction under Section 1361 have appeared in the opinions of several federal courts. See, *e.g.*, *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); *Lovallo* v. *Froehlke*, 468 F.2d 340, 343-344 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); *Burnett* v. *Tolson*, 474 F.2d 877, 880 (4th Cir. 1973). Arguments for broader jurisdiction to review agency action have been made. See Byse and Fiocca, *supra*, 81 Harv. L. Rev. at 318-320; K. C. Davis, *Administrative Law Treatise* § 23.11 (1970) and §§ 23.09-23.10 (1970 Supp.). See also Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 Duke L.J. 207.

damus actions brought before 1962 in the District of Columbia are therefore relevant to the proper construction of Section 1361.

In *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 544 (1937), the Court referred to the "settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete." Several courts of appeals have followed this approach and held that review under Section 1361 is an extraordinary remedy that should be employed only in exceptional circumstances and only where there is no adequate remedy at law. See, *e.g.*, *Cook* v. *Arentzen*, 582 F.2d 870, 876-877 (4th Cir. 1978); *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 946-947 (2d Cir. 1976); *Haneke* v. *Secretary of Health, Education, and Welfare*, 535 F.2d 1291, 1295-1296 (D.C. Cir. 1976); *City of Highland Park* v. *Train*, 519 F.2d 681, 691-692 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).[47] Here, Section 205(g) provides an ade-

[47] See also cases cited in 1 *Moore's Federal Practice* ¶ 0.62 [17], at 700.53 n.18 (2d ed. & Supp. 1978). But see *Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Knuckles* v. *Weinberger*, 511 F.2d 1221 (9th Cir. 1975); *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Md. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (approving the exercise of jurisdiction under Section 1361 to review due process claims under the Social Security Act).

quate legal remedy (see pages 54-56, *supra* and 72, *infra*). Where such a remedy is available, mandamus jurisdiction is not, even if Congress has not explicitly said so. This is true because of the nature of mandamus jurisdiction. An "action in the nature of mandamus" under Section 1361 is not intended to function as a substitute or alternative to any one of the panoply of legal remedies made available by Congress in federal statutes. Rather, it is to serve as a means to compel the performance of a duty owed by a government official or agency, when no legal remedy would suffice to produce the desired relief. Because the class representatives' claim of entitlement to a pre-recoupment oral hearing can be fully adjudicated in a suit under Section 205(g) of the Social Security Act, the district court lacked jurisdiction under Section 1361.

B. Section 205(g) Does Not Authorize Class Relief, and in Particular Does Not Authorize the Class Relief Awarded in This Case

If the preceding arguments are correct and Section 205(g) is the only possible jurisdictional basis for these lawsuits, then the district courts erred in allowing the suits to proceed as class actions. Section 205(g) manifests a congressional intention to bar class actions and to permit adjudication of individual claims only.

1. Section 205(g) Authorizes Only Adjudication of Individual Claims

Section 205(g) authorizes "[a]ny individual" to sue in federal district court in order to obtain judicial re-

view of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party * * *." The district court in such a suit is empowered "to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." This statutory scheme contemplates case-by-case adjudication of individual claims. Such a procedure is an appropriate means for review of administrative decisions, the vast majority of which turn on particular facts.

To the extent the sparse legislative history of Section 205(g) is helpful, it supports the Secretary's position that Congress envisioned a system of judicial review of individual claims only. The reports of the Senate and House committees both indicate that Section 205(g) was intended to fill a gap in the Social Security Act as it was originally passed in 1935: "The present provisions of the Social Security Act do not specify what remedy, if any, is open to *a claimant* in the event *his claim* to benefits is denied by the [Social Security] Board." S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939) (emphasis added). Like the wording of the statute itself, this language reflects the congressional design to authorize district courts to review denials of individual claims.

Although this Court has never formally decided the issue, it has provided indications that class relief is not appropriate under the Social Security Act. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764; *Jablon* v. *Califano*, 430 U.S. 924 (1977), summarily af-

firming 399 F. Supp. 118, 121-125 (D. Md. 1975). On the other hand, several courts of appeals have approved the use of class actions under Sections 205 (g). See, *e.g.*, *Jones* v. *Califano*, 575 F.2d 12 (2d Cir. 1978); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (3d Cir. 1977); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Jimenez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These cases accord insufficient respect to the relevant statutory language and disregard the significant stare decisis effect of appellate decisions, even when rendered in cases involving only a single claimant. Contrary to the fears of the courts of appeals that have endorsed class actions under Section 205(g), the restricted version of judicial review permitted by that statute will have no detrimental effect on the efficient resolution of Social Security Act claims. When a statutory or constitutional issue is decided adversely to the Secretary in the course of judicial review obtained by an individual claimant, the Secretary will either appeal or abide by the unfavorable ruling. See *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-722 (1975). Repetitious litigation will thus not be necessary in order to establish a general legal principle applicable beyond the confines of a particular case.[48] Stare decisis will impel the Secretary to follow statutory or constitutional decisions within the jurisdiction of the courts

[48] In some cases, however, additional litigation of an issue in additional jurisdictions is desirable. See pages 75-76, *infra*.

that have rendered them.[49] In short, neither the language of Section 205(g), nor its legislative history, nor considerations of practical efficiency support the use of class actions in the present context, and the district courts accordingly erred in allowing the named respondents to proceed as class representatives.

2. *Each Person Whose Claim Is To Be Adjudicated Must Satisfy the Jurisdictional Requirements of Section 205(g)*

At the very least, the district courts erred in awarding relief to class members who have sought neither reconsideration of overpayment determinations nor waiver of recovery. *Eldridge* held that the nonwaivable element of Section 205(g)'s "final decision" requirement is the filing of a claim with the Secretary. 424 U.S. at 328. *Salfi* stated that where class members have not filed any such claim, jurisdiction cannot be sustained under Section 205(g). 422 U.S. at 764. The certified classes in these cases include many persons who have not filed a claim challenging one of the Secretary's recoupment decisions.

[49] This is not a case like *Jones* v. *Califano*, *supra*, in which the repeated success of claimants on administrative review, coupled with the apparent failure of the Secretary to alter the practice that gave rise to the individual claims, threatened to preclude judicial review under Section 205(g) and to make the treatment of SSI beneficiaries depend on whether they sought an administrative hearing. Whatever may be the appropriate judicial response in such circumstances, a class action is not necessary here in order to obtain an authoritative decision on whether the Due Process Clause requires pre-recoupment oral hearings.

Indeed, the classes include many persons as to whom the Secretary has not even made an overpayment determination. The district court in *Buffington* certified a class of Social Security insurance beneficiaries whose payments "have been or will be reduced, suspended, terminated or otherwise adjusted without notice and opportunity for a prior hearing * * *" (A. 222). The court in *Elliott* used similar language (A. 35, 37-38). Both district courts therefore exercised jurisdiction over persons who have not filed claims with the Secretary and thus have not satisfied the nonwaivable element of Section 205(g)'s "final decision" requirement.[50] *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), teaches that the class action device may not be used to confer jurisdiction over unnamed parties who otherwise could not invoke federal jurisdiction. Even if some class actions are permissible under Section 205(g), each class member must meet the requirements for invoking Section 205(g) jurisdiction,[51] just as each

[50] Moreover, because the classes in these cases are not subject to any temporal limitation, they include many persons whose suits do not fulfill Section 205(g)'s timing requirement. The statute provides that any civil action seeking review of a final decision by the Secretary must be filed within 60 days after the mailing of notice of that decision (or within such further time as the Secretary may allow). See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764.

[51] In his dissenting opinion in *Norton* v. *Mathews*, 427 U.S. 524, 533-538 (1976), Mr. Justice Stevens rejected the Secretary's argument that Section 205(g) does not authorize class actions; he did agree, however, that in any such action, every class member must satisfy the prerequisites to suit under

class member in *Zahn* had to satisfy the $10,000 jurisdictional amount requirement under 28 U.S.C. 1331.

3. *Section 205(g) Does Not Authorize Injunctive Relief*

The district courts also erred in enjoining the Secretary from recouping Social Security overpayments without first affording the affected beneficiaries an opportunity for an oral hearing. Section 205(g) does not authorize injunctive relief. As this Court noted in *Salfi* (422 U.S. at 763 n.8), the statute "contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court." Nothing in Section 205(g) indicates that Congress intended to authorize the exercise of equitable power to enjoin the operation of a federal statute or to direct that a statute be implemented through procedures other than those established by the Secretary. On the contrary, the grant of jurisdiction is limited to the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute confers no power beyond that necessary to enforce decrees in individual cases.

Equitable remedies such as an injunction are extraordinary forms of relief, available only when

Section 205(g). 427 U.S. at 535-537. But cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (construing a particular statutory scheme that does not pertain to jurisdiction, the Court holds that class relief is available on behalf of persons who have not filed administrative charges).

there is no adequate remedy at law. 4 Pomeroy, *Equity Jurisprudence* § 1338, at 935-936 (5th ed. 1941). An injunction is not available in a suit arising under Title II of the Social Security Act, because Section 205(g) provides an adequate legal remedy. Disputes between individual Social Security beneficiaries and the Secretary, including the present controversy over the need for pre-recoupment oral hearings, can be fully resolved through the simple expedient of "modifying, or reversing" the Secretary's decision, in this case the decision not to provide the requested hearing. If the reviewing court reverses the Secretary's decision to recover an alleged overpayment without first affording an opportunity for an oral hearing, the beneficiary will have obtained all the relief that he sought.[52] The Secretary will be unable to proceed with recoupment until he has offered the desired hearing. Further injunctive relief would have no utility to the individual claimant, and it is not contemplated by Section 205(g).

The restrictive language of Section 205(g) reflects Congress' determination that courts' general equitable powers do not pertain to claims and remedies under Title II of the Act. This case therefore is unlike *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415

[52] And even if, in some cases, judicial relief were not provided until recoupment had commenced, that would not offer adequate reason to issue an injunction applicable to every case. Under "traditional standards * * * the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) (footnote omitted). See also *id.* at 92 n.68.

U.S. 1, 18-20 (1974), *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-293 (1960), and *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-400 (1946), in each of which this Court decided that a limited statutory authorization of injunctive relief would support a somewhat broader equitable remedy or permit the grant of an injunction in circumstances different from those specifically contemplated in the relevant statute.[53] Here, by contrast, Section 205(g) does not authorize *any* equitable remedies. The present case is thus analogous to *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). Although the Court in *Switchmen's Union*

[53] In *Bannercraft* the Court indicated that in an appropriate case the Freedom of Information Act may authorize a district court "to enjoin agency action pending the resolution of an asserted FOIA claim." 415 U.S. at 18-20. The Court's dictum was based in part on the Act's explicit authorization of a different kind of injunctive relief, namely, a decree "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. 552(a)(4)(B). The Court also relied on a series of cases establishing the principle that, in the absence of the clearest command to the contrary from Congress, courts retain power to enter injunctions to preserve their own jurisdiction or to maintain the status quo pending judicial or agency review through prescribed statutory channels. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966); see also the All Writs Act, 28 U.S.C. 1651(a). These cases are inapplicable here, where Section 205(g) guarantees district court jurisdiction to review final decisions by the Secretary and where the relief available under Section 205(g) is adequate to redress erroneous decisions.

found a complete lack of jurisdiction for judicial review of agency action rather than merely a statutory restriction on the remedies that a reviewing court could award, the Court's opinion is instructive in the present context. The Court stated (*id.* at 301):

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. * * * All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States*, 270 U.S. 568, 576-577. In such a case the specification of one remedy normally excludes another.

See also *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) ("where a statute creates a right and provides a special remedy, that remedy is exclusive"); *Cell Associates* v. *National Institutes of Health*, 579 F.2d 1155, 1159-1162 (9th Cir. 1978) (no injunctive relief for a violation of Section 3(b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), because Congress provided a damages remedy for such violations and did not authorize injunctive relief, even though it did provide an injunctive remedy for violations of other portions of the Act). These decisions demonstrate that courts should not simply assume the power to award injunctive relief where Congress (in Section 205(g)) has provided an adequate legal remedy and (in Section 205(h)) has manifested an intention that that remedy be exclusive.

4. *Relief That Runs Nationwide Is Inappropriate*

The *Buffington* court's decision to award injunctive class relief is particularly objectionable because of the nationwide character of the class certified in that case. Certification of nationwide classes precludes the reasoned consideration of a difficult legal problem by more than one court. The first case to reach decision forecloses the opportunity for further debate. Moreover, the unnecessary granting of nationwide relief against federal officers places undue burdens on this Court. Holdings that might not warrant the Court's immediate review if relief had been narrowly tailored inevitably assume substantially greater significance when the relief requires revision in the nationwide administration of a federal program. Thus the unnecessary granting of nationwide relief by a lower court may have the practical effect of forcing this Court to undertake what otherwise might be viewed as premature consideration of complex and important issues. See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977); *Maryland* v. *Baltimore Radio Show*, 338 U.S 912, 918 (opinion of Frankfurter, J., respecting the denial of certiorari) ("It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time of ripening"), quoted in *Singleton* v. *Commis-*

sioner, No. 78-78 (Oct. 30, 1978) (opinion of Stevens, J., respecting the denial of certiorari).[54]

Equity jurisprudence teaches that where injunctions are available they should be used sparingly. *Irwin* v. *Dixion*, 50 U.S. (9 How.) 10, 33 (1850). As a general rule, injunctive relief should do no more than afford redress to the complaining parties; it should be no more burdensome on the defendant than is necessary to provide complete relief to the plaintiffs. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971). See also *Milliken* v. *Bradley*, 418 U.S. 717 (1974). A court order compelling the Secretary to offer pre-recoupment hearings to all overpaid Social Security old-age and survivors' insurance beneficiaries violates this sound principle governing the exercise of courts' equitable powers.

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[54] There is no more reason to permit the certification of a nationwide class in Social Security cases than there would be in, say, income tax refund suits or petitions to set aside orders of the NLRB. As the Second Circuit put the matter with respect to an argument that the doctrine of collateral estoppel confines the government to a single appellate resolution of tax questions: the laws affect many persons and raise complex issues, so that judges may be expected to disagree on their resolution; the first court to decide the question may not do so correctly; yet giving collateral estoppel effect to the first decision would foreclose further consideration. Any judicial decision that forecloses consideration and thus impairs this Court's ability to decide the issue "would be imprudent, if not irresponsible." *Divine* v. *Commissioner*, 500 F. 2d 1041, 1049 (2d Cir. 1974).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1978

APPENDIX

PERTINENT PROVISIONS OF THE SOCIAL SECURITY CLAIMS MANUAL, EFFECTIVE JANUARY 1979

5503. Written Notice

When it is determined that an overpayment has been made, the person liable for repayment should be notified in writing (see § 5508.5 for sample letters). The notice will inform the person of:

(a) The incorrect payment made and how and when it occurred (i.e., the overpaid amount, the monthly amount, if any, which should have been paid, why the different amount was due, the months for which the different amount should have been paid, and the amount which was paid for those months). If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the NH [*i.e.*, the wage earner], and basis for entitlement of the new beneficiary (§ 4571(a)).

(b) The right to request reconsideration of the overpayment determination.

(c) The required recovery, including the proposed adjustment (§ 5513.1) or the request for refund where adjustment is not possible.

(d) The right to consideration under the waiver provision of the law.

(e) The availability of a different rate of adjustment when adjustment has been proposed or of installment refunds when adjustment is not available.

(f) The need to notify the DO promptly if the person feels that the circumstances in the case would justify reconsideration, waiver, a different rate of adjustment, or installment refund.

* * * * *

5513.1 Proposed Rate of Adjustment

(a) 25-Percent Withholding

When adjustment is the method of recovery of an overpayment which does not involve fraud (see (b) below), a withholding of 25 percent of a person's full monthly benefit (before any SMI [Medicare] premium deduction and rounded up to the next whole dollar) will be proposed. Since 25-percent withholding will be applied only to the benefit amount (e.g., before SMI premium deduction, VR [vocational rehabilitation] deduction, GP [governmental pension] offset, etc.) which is due the person from whom recovery is sought, full withholding may result for a month for which only a partial benefit is payable (e.g., because of the charging of excess earnings). Similarly, when a combined check [*i.e.*, a check including benefits payable to a beneficiary and his spouse or a check including benefits for more than one child of a beneficiary] * * * is involved, the 25-percent withholding will be applied to the amount due the person from whom recovery is sought and not simply against the total amount of the combined check.

The 25-percent withholding does not apply to the withholding of benefits to offset current year work and earnings (i.e., current year work suspension ad-

justments) but does apply to the adjustment of penalty deductions.

See § 5515.8(c) if an overpayment is currently being adjusted.

(b) 25-percent Withholding Not Permitted in Fraud Situations

Regardless of a beneficiary's alleged financial circumstances, never propose 25-percent withholding to recover an overpayment which was the result of fraud (i.e., an intentional false statement or representation by the person against whose benefits adjustment is being made, or by his willful concealment of or deliberate failure to furnish material information—§ 7505). In such situation, full withholding of the benefit to adjust the overpayment is required, except that the amount necessary for the SMI premium may be withheld for that purpose rather than to reduce the overpayment.

However, since the legal assistant will generally establish fraud only after an overpayment has been determined and adjustment proposed (§ 5500(c)), the initial notice of overpayment will rarely propose full withholding. If at any subsequent point the legal assistant determines that the overpayment was caused by fraud (whether or not prosecution is being recommended), take action to withhold the full monthly benefit (except for any SMI premium) to recover the balance of the overpayment.

DIFFERENT RATES OF ADJUSTMENT

5515. Different Rate of Adjustment

(a) General

When a person currently eligible for payment of title II benefits is liable for repayment of an overpayment, the initial notice of overpayment (§ 5503) will propose recovery of the overpayment by a withholding of 25 percent of the full amount of the benefit payable (§ 5513.1). The proposed rate of withholding may not be required, however, if a request for waiver or a different rate of adjustment is received (§ 5503.55).

(b) When to Consider Different Rate of Adjustment

When a person against whom adjustment has been proposed (or whose benefit is being withheld) for purposes of overpayment recovery does not take issue with the overpayment or its recovery and clearly requests only a different rate of adjustment, it will often be necessary to know only the amount of the overpayment and the person's monthly benefit to decide if the rate requested may be granted. When a different rate of adjustment only is requested, never have the person complete an SSA-561 [the reconsideration request form]. Have the person complete an SSA-632 [the waiver request form] (i.e., to permit findings as to fault and defeat the purpose) only if the person requests (1) a withholding of less than $10 a month or (2) a rate of withholding which would not complete recovery within 48 months (or before a termination of entitlement).

Conversely, a request for waiver of recovery which must be denied should always result in consideration of a different rate of adjustment. Note that, if waiver depends upon a finding of defeat the purpose of title II and the beneficiary does not have the incorrect funds in his possession (§ 5546) and needs only part of his monthly benefit for ordinary and necessary living expenses (§§ 5550-5551), waiver should be denied and adjustment at the rate he can afford to repay established. However, if it would be necessary to withhold less than $10 a month to preclude a finding of defeat the purpose, approve waiver rather than establish the lower adjustment rate if the person is without fault. Of course, if the person is at fault in causing the overpayment, waiver cannot be approved, and the rate of adjustment should be established in accordance with § 5515.4(c).

(c) Reasons for Different Adjustment Rates

A flexible rate of adjustment to recover an overpayment serves three basic purposes:

(1) If the person is dependent upon some of his monthly benefit for ordinary and necessary living expenses, withholding only part of the benefit each month eases the financial situation to some extent by permitting the person to rely upon a part of the benefit to meet current basic needs during the recovery period.

(2) If the waiver depends upon whether full or partial adjustment would defeat the purpose of title II (§§ 5550-5551), withholding a lesser part of a monthly benefit may permit a denial of waiver (i.e.,

the overpayment can be recovered without depriving the beneficiary of funds needed for ordinary and necessary living expenses); or

(3) If monthly benefits payable to an SMI enrollee are subject to withholding to recover an overpayment, application of part of the monthly benefits to pay his SMI premiums:

(A) facilitates the collection of the premiums;

(B) reduces the cost of premium collection by eliminating direct billing; and

(C) helps the individual retain his SMI coverage.

5515.4 Establishing Different Rate of Adjustment

(a) General

If the beneficiary requests a different rate of adjustment or a request for waiver must be denied, the rate of adjustment established will depend on the facts in the particular case.

If a withholding greater than the proposed 25-percent rate of adjustment (or the adjustment in effect) is requested, grant the request without development.

If a lesser withholding is requested, grant the request without development unless (1) recovery at the rate requested would not complete recovery within 48 months (or before the termination of entitlement), or (2) the rate requested is less than $10 a month. When a request for a lesser rate of withholding must be developed (i.e., recovery would not

be completed within 48 months or before termination, or the rate of adjustment would be less than $10 monthly), the development is the same as for waiver (i.e., whether or not the person is without fault and whether or not recovery would defeat the purpose of title II) and a waiver determination should be made.

Generally, the amount withheld will be the rate requested unless (1) financial circumstances would permit a greater withholding, or (2) the person is at fault and the rate requested is less than 25 percent of the monthly benefit and would not permit full recovery within 48 months (or before termination of entitlement). (NOTE: Whenever reference is made to recovery within 48 months in this section, consider whether entitlement will terminate before completion of a 48-month recovery period, and, if so, use the nearer date in setting the recovery period.) Where the suggested amount of withholding is less than 25 percent of the monthly benefit and would not result in full recovery with 48 months (or before termination), the withholding established should be 25 percent of the monthly benefit or, if less, the amount necessary to complete recovery in 48 months (or before termination of entitlement).

Note that a withholding of less than the full monthly benefit (except for the SMI premium, where applicable) is not permitted if fraud is involved (§ 5513.1(b)).

(b) When to Develop—Waiver Not Requested

When a lesser rate of adjustment is requested and the lesser rate of adjustment would not permit the overpayment to be recovered within 48 months or before termination of entitlement, develop fault and secure detailed financial information by having the beneficiary complete an SSA-632; establish the rate of adjustment in accordance with (d) below.

If the person requests a lesser rate of adjustment which will complete recovery within 48 months or before termination, presume that withholding at the 25-percent rate will cause financial hardship and grant the requested rate. Do not develop for fault or ability to repay.

Development is never required if the beneficiary requests a rate of adjustment greater than the proposed 25-percent withholding.

(c) Adjustment Rate—SSA-632 Not obtained

Where financial information was not obtained in connection with a request for waiver and development was not required by (b) above, adjust the overpayment at the rate requested.

EXAMPLE 1: Ed Adams is entitled to a monthly benefit of $100 a month and has been overpaid $240. A monthly withholding of $25 has been proposed. He requests a withholding of $15 a month. Since there is no available financial information which

would warrant a greater rate of adjustment (i.e., there is no reason to question the suggested rate) and the suggested rate will permit recovery in 16 months, grant the request by withholding $15 a month. Presumably the beneficiary is left with enough income to provide for his ordinary and necessary living expenses.

EXAMPLE 2: Geraldine Jones is overpaid $980, and a 25-percent withholding of her $200 monthly benefit has been proposed. She requests that the overpayment be recovered by withholding $20 a month from her benefit. Since withholding $20 for 48 months would not complete recovery of the overpayment, do not apply the financial hardship presumption. After developing fault and obtaining financial information, establish a rate of adjustment in accordance with (d) below.

(d) Adjustment Rate—SSA-632 Obtained

1. Person Without Fault

When a person is without fault, generally withhold that amount by which the beneficiary's income exceeds his expenses (unless he also has excess resources). However, withhold no less than

A. $10 per month (if it would be necessary based on a comparison of income and expenses to withhold less than $10, waive recovery; partial adjustment does not apply); or

B. the full monthly benefit (after deduction for any SMI premiums) to the extent of any incorrect funds in the beneficiary's possession (§ 5546).

If the beneficiary has excess resources (§ 5550.2), withhold (up to 100 percent exclusive of SMI premiums) at the rate permitted by the income/resources. Adapt the above guidelines by taking the resources, as well as any income which exceeds expenses, into consideration.

Also, if the criteria for waiver are not met and the beneficiary requests a greater rate of withholding than would be established using the above rules, adjust at the rate requested by the beneficiary.

EXAMPLE 1: Ellie Stone has been found without fault but must be denied waiver because she did not establish that recovery of a $3,000 overpayment would defeat the purpose of title II. Mrs. Stone does not have any of the incorrect funds in her possession, but she had monthly income (including an E benefit of $150) of $425 and expenses of only $375 a month. Her benefits will terminate in 6 months when her child attains age 18. Recover the overpayment by withholding $50 (i.e., income of $425 minus expenses of $375) a month, rather than the $32 initially proposed. (Had Mrs. Stone requested that, say, $65 be withheld, the rate of adjustment would be established as $65 a month.) When E benefits terminate, request refund of the overpayment outstanding (§ 5515.8(a)).

EXAMPLE 2: Paul Beta has been found without fault but must be denied waiver because he has not established that recovery of an $860 overpayment would defeat the purpose of title II. Although his expenses equal his income, he has the incorrect benefits of $860 in his possession. Although a withholding of only 25 percent of the monthly benefit had been proposed, do not grant partial adjustment; withhold Mr. Beta's full monthly benefit until the overpayment has been recovered.

2. Person At Fault

If the comparison of income/resources and expenses would indicate a withholding of less than 25 percent of the monthly benefit, establish the amount by which income/resources exceed expenses as the rate of adjustment provided full recovery will be completed within 48 months (or the beneficiary's expected last month of entitlement). However, if withholding of less than 25 percent of the benefit would not permit full recovery within 48 months (or, if earlier, the beneficiary's expected last month of entitlement), withhold 25 percent of the monthly benefit.

EXAMPLE 1: Zoe Wyler has been found at fault in causing a $1,080 overpayment and waiver must be denied even though her income, including a widow's benefit of $164, exceeds her expenses by only $5 a month. A withholding of $10 (the minimum rate of adjustment) will not complete recovery in 48

months; it is necessary to withhold $23 a month to recover the $1,080 overpayment in 48 months. (Had the overpayment been $7,900, recovery could not have been completed in 48 months even if the full $164 benefit were withheld; in such case, $41, or one-fourth the benefit, as initially proposed, should be established as the rate of adjustment.)

EXAMPLE 2: Lydia Lively received notice of a proposed withholding of $50 (i.e., 25 percent of her $200 monthly benefit) for 30 months to recover a $1,500 overpayment. Since her request for a withholding of only $25 a month would extend the recovery period to 60 months, fault and financial circumstances are developed.

A. A comparison of her income (and resources) and expenses would warrant a withholding of less than $10 a month. If she were without fault, recovery would have been waived. However, since without fault is not found, recovery must be denied; in such case, withhold $32 in order to complete recovery within 48 months.

B. Based on her financial circumstances, a withholding of $15 is warranted. If she were without fault, the rate requested (i.e., $25) would have been established. However, since she is at fault, it is necessary to withhold $32 in order to complete recovery within 48 months.

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OVERPAYMENTS

5515.5—PARTIAL ADJUSTMENT CHART

FRAUD NOT ESTABLISHED		
REQUEST FOR LARGER WITHHOLDING	REQUEST FOR SMALLER WITHHOLDING	
	WITHHOLDING WOULD NOT COMPLETE RECOVERY WITHIN 48 MONTHS OR BEFORE TERMINATION OR IS LESS THAN $10	WITHHOLDING IS AT LEAST $10 AND WILL COMPLETE RECOVERY WITHIN 48 MONTHS OR BEFORE TERMINATION
No development required	Obtain SSA-632	No development required
Withhold at requested rate	To extent of any part of overpayment in beneficiary's possession, deny waiver; withhold full benefit If at fault, deny waiver; withhold amount (up to 25 percent of benefit) needed to complete recovery within 48 months or before termination, whichever is first If without fault *but* recovery would not defeat the purpose of title II, deny waiver; withhold amount by which income/resources exceed expenses If without fault *and* recovery would defeat the purpose of title II, waive recovery	Withhold at requested rate
FRAUD ESTABLISHED:	Withhold full benefit (except for SMI premium deduction)	

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